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(27,362)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 607.

MICHAEL MAGUIRE AND C. S. MAGUIRE, PLAINTIFFS IN ERROR,

vs.

TIMOTHY A. REARDON ET AL., AS COMMISSIONERS, CONSTITUTING THE BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.

IN ERROR TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE.

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S. F. No. 8925.

In the Supreme Court of the State of California, Division Two.

1 Civ. 2809.

MICHAEL MAGUIRE and C. S. MAGUIRE, Plaintiffs and Appellants,

vs.

TIMOTHY A. REARDON, ADOLPH JUDELL and DANIEL G. FRASER, as Commissioners Constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan, as Chief Building Inspector; John Doe, James Doe and William Doe, and City and County of San Francisco (a Municipal Corporation), Defendants and Respondents.

Transcript on Appeal from the Judgment of the Superior Court of the State of California in and for the City and County of San Francisco.

Honorable Geo. E. Crothers, Judge.

Andrew G. Maguire, J. F. Riley, Pacific Building, San Francisco, Attorneys for Appellants.

George Lull, City Attorney, City and County of San Francisco; Maurice T. Dooling, Jr., Assistant City Attorney, City and County of San Francisco, City Hall, San Francisco, Attorneys for Respondents.

Filed Nov. 6, 1918. B. Grant Taylor, Clerk, by —— ——, Deputy.

1 S. F. No. —.

In the Supreme Court of the State of California.

MICHAEL MAGUIRE and C. S. MAGUIRE, Plaintiffs and Appellants,

vs.

TIMOTHY A. REARDON, ADOLPH JUDELL and DANIEL G. FRASER, as Commissioners Constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan, as Chief Building Inspector; John Doe, James Doe and William Doe, and City and County of San Francisco (a Municipal Corporation), Defendants and Respondents.

Transcript on Appeal from the Judgment of the Superior Court of the State of California in and for the City and County of San Francisco.

Honorable Geo. E. Crothers, Judge.

2 In the Superior Court of the City and County of San Francisco, State of California, Dept. No. 14.

No. 85391.

MICHAEL MAGUIRE and C. S. MAGUIRE, Plaintiffs,

vs.

TIMOTHY A. REARDON, ADOLPH JUDELL and DANIEL G. FRASER, as Commissioners Constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan, as Chief Building Inspector; John Doe, James Doe and William Doe, Defendants.

Complaint for Injunction.

Plaintiffs complain of defendants and for cause of action allege:

I.

That both plaintiffs are now, and at all times herein mentioned were citizens of the United States of America and of the State of California, and are now and at all said times were, residents of the City and County of San Francisco, State of California.

3 II.

That defendants, Timothy A. Reardon, Adolph Judell and Daniel G. Fraser, are now and have been for more than one year last past the duly qualified and acting commissioners of the Board of Public

Works in and for the City and County of San Francisco, State of California, and that as such commissioners at all said times herein mentioned they have constituted and do now constitute the Board of Public Works of the City and County of San Francisco. Said John P. Horgan is their chief building inspector. The defendants John Doe, James Doe and William Doe are sued herein by fictitious names; and petitioners pray that when their true names are ascertained the same may be inserted herein in lieu of said fictitious names.

III.

That plaintiffs are now and have been during all times hereinafter mentioned the owners in fee simple absolute of that certain parcel of real estate, situate, lying and being in the City and County of San Francisco, State of California, and bounded and described as follows, to wit:

Commencing at the point forming the intersection of the southerly line of Hayes street with the easterly line of Van Ness
4 avenue; running thence southerly on the easterly line of Van Ness avenue one hundred and twenty (120) feet; thence at right angles easterly one hundred (100) feet; thence at right angles northerly one hundred and twenty (120) feet, and thence at right angles westerly and along said southerly line of Hayes street one hundred (100) feet to the point of commencement. Being part of Western Addition Block 69 according to the official maps of the City and County of San Francisco.

IV.

That heretofore, to wit, in or about the month of May, 1906, and by and with the consent and permission of the Board of Public Works of said City and County of San Francisco, and of the City and County of San Francisco, there was constructed and erected upon the said described parcel of real estate a substantial one-story wood building, containing nine stores, known and designated as numbers 145 and 147 Hayes street and numbers 130-132-134-136-138-140-142-144 Van Ness avenue, at an expense of twelve thousand (12,000) dollars, and that ever since said time the said building has been and now is upon the said lot of land above described and constitutes
an improvement thereon. That said building has been leased
5 by plaintiffs to and is now occupied by tenants and is used for lawful business purposes, the tenants in said nine stores being engaged in the sale of goods, wares and merchandise, the automobile repair business, carpenter work, etc., and all duly licensed by the said city and county to conduct said businesses in said stores; and said building yields at this time a substantial monthly rental. That said building is of great value and is in a good and tenantable condition and is fit and proper for the purposes for which it was designed and for which it is occupied; and that the City and County of San Francisco has ever since the construction thereof, as aforesaid, assessed said building and taxed the same as property, and that

the said improvements are now assessed and now taxed as property by said City and County of San Francisco, and that plaintiffs have for over ten years last past paid all taxes levied and assessed thereon as they have become due; that said building has been assessed for the present fiscal year, and plaintiffs will be compelled to pay the taxes for the present fiscal year now due and payable, under penalty of the sale to the State of said property.

V.

That said building is assessed for taxes by the City and County of San Francisco for the present fiscal year for 1917-1918 and
6 the taxes thereon for said year are a lien upon the real estate above described and must be paid by said plaintiffs.

VI.

That the said City and County of San Francisco has since the erection of said building above described erected and maintained and used, and is now maintaining and using in the same district or fire limits (referred to in the alleged ordinance hereinafter set forth) in and within which said building belonging to plaintiffs is situated, wooden buildings.

VII.

That on October 24, 1917, the said commissioners constituting the said Board of Public Works did, at a meeting of said board, regularly held, adopt a so-called resolution in words and figures as follows:

Resolution 55734, Second Series.

Resolved, that chief building inspector John P. Horgan be, and is hereby directed to serve notices upon the parties responsible for the shacks at the southeasterly corner of Van Ness avenue and Hayes street known as 145 and 147 Hayes street, and 130, 132, 134, 136,
7 140, 142 and 144 Van Ness avenue, to raze these buildings within 5 days from the date of the service of notices; also that said chief building inspector be and is hereby requested to file immediately with the Board of Public Works an estimate of the cost of razing these shacks.

Adopted October 25, 1917, by the following vote:

Ayes: Commissioners Judell, Fraser and Reardon.

D. R. S.

VIII.

That thereafter and on October 29, 1917, said commissioners, so constituting the said Board of Public Works, did cause to be served on each of the said plaintiffs a written notice in words and figures as follows, to wit:

Office of Board of Public Works,

San Francisco, Cal., Oct. 29, 1917.

To the Owner or Owners of that Certain Building or Structure Maintained on the lot situated at the southeasterly corner of Van Ness avenue and Hayes street in the City and County of San Francisco, and fronting upon both of said named streets:

You are hereby notified that under and by virtue of the authority and direction provided in an ordinance of the City and County of San Francisco, approved May 8, 1917, and entitled, "Ordinance No. 4170, new series, amending Ordinance No. 1008, new series, known as "The Building Law", approved December 22, 1909, by
8 adding thereto a new section to be numbered, "301-a", the Board of Public Works of said city and county will demolish and remove that certain building or structure owned and maintained by you, as the owner or owners thereof, on the lot situated at the southeasterly corner of Van Ness avenue and Hayes street in said city and county and fronting upon both streets, upon the failure of you, as such owner or owners, to demolish and remove the same within five days from the service of this notification.

A copy of the said ordinance is hereto attached for reference by you to the provisions thereof.

[SEAL.] BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO,
By JOHN P. HORGAN,
Chief Building Inspector.

Served upon C. S. Maguire on the 29 day of October, 1917, by Louis Bailey, Inspector of Buildings.

Attached to said notice was a copy of said ordinance referred to in said notice which is in words and figures as follows:

Bill No. 4515.

Ordinance No. 4170 (New Series).

Amending Ordinance No. 1008 (new series) known as "The Building Law", approved December 22, 1909, by adding
9 thereto a new section to be numbered "301a".

Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. A new section is hereby added to Ordinance No. 1008 (new series) known as "The Building Law" to be numbered 301a to read as follows:

"Section 301a. It shall be unlawful for any person, firm, company or corporation to erect, place or maintain any wooden building

or structure of any kind whatsoever in that portion of the City and County of San Francisco described in section 3, part 2 hereof as the Fire Limits".

It is hereby made the duty of the Board of Public Works to enforce the provisions of this section and said Board of Public Works is hereby authorized and directed to demolish and remove any building or structure affected by this section upon the failure of the owner or owners thereof to comply with the terms of this section; and the cost of said demolition and removal shall constitute a first lien on said building or structure and material thereof.

Ordinance No. 1139 (new series) approved April 12, 1910, is hereby repealed.

Finally Passed—Board of Supervisors, San Francisco, May 7, 1917.

10 Ayes: Supervisors Brandon, Deasy, Gallagher, Hayden, Hilmer, Hocks, Hynes, Kortick, Lahaney, McLeran, Mulvihill, Nelson, Nolan, Power, Suhr, Walsh, Welch, Wolfe.

J. S. DUNNIGAN,
Clerk.

Approved, San Francisco, May 8, 1917.

JAMES ROLPH, JR.,
Mayor.

IX.

That on the same day, namely, October 29, 1917, said commissioners did cause to be served on each of the tenants of plaintiffs occupying said nine stores, a written notice in words and figures as follows:

City and County of San Francisco,

Department of Public Works,

Bureau of Building Inspection.

To the tenant or tenants of building and premises situate on the east line of Van Ness Ave., south of Hayes street and known and numbered as 134 Van Ness avenue *street* of the city and county of San Francisco:

You are hereby notified that the owner of the above described premises has been notified to demolish and remove said building or structure within five days, and in accordance therewith you will take whatever steps you deem necessary for the protection of
11 your property upon said described premises before such demolition and removal.

BOARD OF PUBLIC WORKS,
By JOHN P. HORGAN,
Chief Building Inspector.

X.

That said alleged Ordinance No. 4170 above set forth is unconstitutional in that it is discriminatory, in that it makes unlawful the erection, placing or maintaining of a wooden building, but does not make unlawful the erection, placing or maintaining of buildings of canvas, or papier maché or more inflammable and unsafe materials than wood, and provides for the taking of property and the destruction and deprivations and divesting of vested rights without due or any process of law in violation of the provisions of section 1, article XIV of the Constitution of the United States of America and in violation of the provisions of the Constitutions of the United States of America and of the State of California and further as being retroactive and impairing the obligations of contracts and further that it is unreasonable.

XI.

That the said Board of Public Works has threatened that it will immediately upon the termination of the five days mentioned
12 in said notice, to wit, on November 3, 1917, or immediately thereafter, and it does intend to and will, as it has so threatened, and at the time above stated, through its employees, servants and deputies or contractors forcibly enter on the said lot of land and into the said building and stores of these plaintiffs and that they will then and there forcibly remove the plaintiffs' tenants and their goods, wares and merchandise therefrom, and throw the same in the public street, and that they will furthermore, then and there wantonly and maliciously demolish and remove the said building and the material out of which it has been erected, and will make the same unfit for occupation or for the transaction of business, and will thereby deprive these plaintiffs and their said tenants of the use, rents, issues and profits of the same; and that thereby they will irreparably damage these plaintiffs in their said property and will prevent these plaintiffs from keeping their contracts and agreements with their said tenants for the peaceable use and enjoyment of the same as the lessees of plaintiffs and will cause great and irreparable damage to plaintiffs.

XII.

That the said defendants, Board of Public Works, and its employees and agents are proceeding and do intend to proceed in the
13 said matter of the demolition and removal of the said building and the ejectment of the tenants of plaintiffs and the destruction of the goods, wares and merchandise of said tenants, and the ruining of the businesses of said tenants wholly without any warrant or process of law, but on their own initiative; that they do intend to and will deprive plaintiffs and their tenants of their said property without due or any process of law to the irreparable damage of plaintiffs and of each of them, as hereinabove alleged. That said

acts so threatened to be done will be done unless restrained by this court.

XIII.

Petitioners have no plain, speedy or adequate remedy at law in the premises; that said acts, if permitted, will work great and irreparable injury to petitioners and to each of them.

That it is proper that a writ of injuncion restraining said defendants, their and each of their agents, employees, servants and contractors from demolishing or removing said building or any part thereof, and from interfering with the plaintiffs' possession and enjoyment of said building or of any part thereof, be issued.

14

XIV.

Wherefore these plaintiffs pray for the judgment and decree of this court restraining and enjoining the said defendants, their agents, employees, servants, contractors and deputies and each of them from carrying out their said intentions and purposes of demolishing and removing the said building on said lot of land of these plaintiffs or any part thereof, or to dispossess plaintiffs or their tenants therefrom or from any part thereof, and enjoining them and restraining them and each of them from entering thereon for any such purpose, and that pending this action a temporary restraining order issue preventing and restraining them and each of them from demolishing and destroying or removing or injuring or taking down the said building on said lots of land or any part thereof, or to dispossess plaintiffs or their tenants therefrom; and that they show cause before this court at a specified time and place why a temporary injunction should not issue; that plaintiffs have such other and further relief as to this court may seem just and proper in the premises, and that they have judgment for their costs.

ANDREW G. MAGUIRE,
J. F. RILEY,
Attorneys for Plaintiffs.

15 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. S. Maguire, being first duly sworn, deposes and says that he is one of the plaintiffs in the action above named and that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief and that as to those matters he believes it to be true.

C. S. MAGUIRE.

Subscribed and sworn to before me this 1st day of November, 1917.
[SEAL.]
JOHN L. MURPHY,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed Nov. 1, 1917. H. I. Mulcrevy, Clerk, By L. J. Welch, Deputy Clerk.

Office of the Sheriff of the City and County of San Francisco.

I hereby certify that I received the annexed summons on the 1st day of November, A. D. 1917, and personally served the same on the 13th day of December, A. D. 1917, on the City and County of San Francisco, the defendant therein named, by delivering to
16 James Rolph, Jr., Mayor of the City and County of San Francisco, the said defendant, personally in the City and County of San Francisco, State of California, a copy of said summons attached to a copy of the complaint in said action.

Dated at San Francisco, this 13th day of December, A. D. 1917.

THOS. F. FINN,
Sheriff.
By W. J. HEFFERNAN,
Deputy Sheriff.

OFFICE OF THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, *ss:*

I hereby certify that I received the annexed summons on the 1st day of November, A. D. 1917, and that I personally served the said summons and the copy of the complaint therein referred to, upon the hereinafter named defendants, personally, in the County of San Francisco, State of California, by delivering to and leaving with each of said hereinafter named defendants a copy of said summons and a copy of said complaint at the time set opposite their names, respectively.

Name of defendant served.	Time of service.
D. G. Fraser	5 p. m. Nov. 1st 1917
T. A. Reardon	9:30 a. m. Nov. 2nd 1917
A. Judell	9:40 " " " "
J. P. Horgan	9:27 " " " "

17 Dated at San Francisco, this 2nd day of November, 1917.

THOS. F. FINN,
Sheriff.
By GEO. W. DILLON,
Deputy Sheriff.

18 [Title of Court and Cause.]

Amended Answer to Complaint.

Come now the defendants Timothy A. Reardon, Adolph Judell, Daniel G. Fraser, John P. Horgan, and City and County of San Francisco, and by leave of court first had and obtained file this amended answer, and by way of answer to the complaint on file herein admit, allege and deny as follows:

I.

Answering the second paragraph numbered "III" in said complaint defendants deny that said frame building referred to in said paragraph was constructed and erected or constructed or erected by and with or by or with the consent and permission or consent or permission of the Board of Public Works of the City and County of San Francisco, and of the City and County of San Francisco, or of either or any of them.

Further answering said second paragraph numbered "III" defendants deny that said building is of great or any value, and
19 deny that it is in good and tenantable or good or tenantable condition and is fit and proper or fit or proper for the purposes for which it was designed and for which it is occupied or for any purpose or use whatsoever or at all.

II.

Answering paragraph X of said complaint defendants deny that said Ordinance No. 4170 (new series) is unconstitutional for the, or any of the, reasons in said paragraph set out, or otherwise or at all, and deny that it is discriminatory, in that it makes unlawful the erection, placing or maintaining of a wooden building, but does not make unlawful the erection, placing or maintaining of buildings of canvas or pap-er maché or more inflammable and unsafe materials than wood, or otherwise or at all; deny that it provides for the taking of property, and the destruction or the destruction, and deprivations or deprivations, and divesting or divesting of vested rights without due or any process of law in violation of section 1, article XIV of the Constitution of the United States of America and in violation or in violation of the or any provisions or provision of the Constitutions of the United States of America and of the State of California, or either of them; and deny that it is unconstitutional as be-
20 ing retroactive and impairing or impairing the obligations of contracts; and deny that it is unreasonable.

III.

Answering paragraph XI of said complaint, defendants deny that said Board of Public Works, through its employees, servants and deputies or contractors or any of them, or otherwise, do intend or will forcibly enter on the said lot of land and into the said building and stores or building or stores of plaintiffs, and deny that they will forcibly or otherwise remove the plaintiffs' tenants and their goods, wares and merchandise or either or any of them therefrom, and deny that they will throw the same or either or any of them in the public street. Defendants further deny that they will wantonly and maliciously or wantonly or maliciously wreck, demolish and destroy, or wreck or demolish or destroy the said building and the material or the material out of which it has been erected, but defendants admit in this behalf that they intend to and will, unless restrained by this

honorable court, proceed to demolish and remove the said building under the authority vested in them by Ordinance No. 4170 (new series) of the Board of Supervisors of the City and County of San Francisco, hereinafter pleaded and set forth. Defendants further deny that they will thereby or at all cause great and irrepa-
21 rable or great or irreparable damage, or any damage whatsoever.

IV.

Answering paragraph XII of said complaint, defendants deny that said defendants, Board of Public Works, and its agents and employees or agents or employees or any of them are proceeding and do or do intend to proceed in the destruction of said building wholly or at all without any warrant or process of law, and deny that they or any of them are proceeding or intend to proceed on their own initiative or without the plaintiffs having had any day in court, or any opportunity to make any defense or showing whatsoever; and deny that they do intend and will or will deprive plaintiffs of their said property without due process of law or to their irreparable or other damage or to the irreparable or other damage of any of them. In this behalf defendants allege that they and each of them intend to and will proceed under the authority vested in them by said Ordinance No. 4170 (new series) and not otherwise.

V.

Answering paragraph XIII of said complaint, defendants deny that it is proper that a writ of injunction be issued restraining
22 defendants, their and each of their agents, employees, servants and contractors, or any of them, from demolishing or removing said building or any part thereof, and from interfering or from interfering with plaintiffs' possession and enjoyment or enjoyment of said building or of any part thereof.

VI.

Further answering the allegations of said complaint defendants allege that the Charter of the City and County of San Francisco now provides, and at all the times herein mentioned has provided in subdivision 5 of section 1 of chapter II of article II thereof, as follows, to wit:

Section 1. Subject to the provisions, limitations and restrictions in this Charter contained, the Board of Supervisors shall have power:
* * *

5. To fix the limits within which wooden buildings or structures shall not be erected, placed, or maintained, and to prohibit the same within such limits. Such limits when once established shall not be changed except by extension."

Pursuant to the power in them vested by this provision of the

Charter, and long prior to the construction of said frame building herein referred to, the Board of Supervisors of the City and
23 County of San Francisco duly and regularly adopted and enacted an Ordinance No. 1198. Said ordinance was duly and regularly approved and became a law on May 5, 1904, and said ordinance was entitled:

"Defining the Fire Limits of the City and County of San Francisco."

Said ordinance was and remained in full force and effect until July 5, 1906. Section 1 of said Ordinance No. 1198 read and provided as follows:

"Section 1. The fire limits shall be bounded by a line commencing at the intersection of the shore line of the Bay of San Francisco with the easterly end of Greenwich street; running thence westerly along the center line of said Greenwich street to its intersection with the center line of Sansome street; thence southerly along the center line of Sansome street to its intersection with the center line of Broadway; thence westerly along the center line of Broadway to the center line of Virginia Place; thence southerly along the center line of Virginia Place to its intersection with the center line of Pacific street; thence westerly along the center line of Pacific street to the center of the crossing of Pacific and Powell streets; thence southerly along the center line of Powell street to the center of the
24 crossing of Powell and Sacramento streets; thence easterly along the center line of Sacramento street to the center of the crossing of Sacramento and Stockton streets; thence southerly along the center line of Stockton street to a point distant one hundred and thirty-seven and one-half (137½) feet northerly from the northerly line of Bush street; thence westerly parallel with Bush street on a line distant one hundred and thirty-seven and one-half (137½) feet northerly from the northerly line of Bush street to the center line of Van Ness avenue; thence at right angles southerly along the center line of Van Ness avenue to the intersection of the center line of Fell street; thence westerly along the center line of Fell street to the center of the crossing of Fell and Franklin streets; thence southerly along the center line of Franklin street to the center of the crossing of Franklin and Page streets; thence westerly along the center line of Page street to the center of the crossing of Page and Gough streets; thence southerly along the center line of Gough street to its intersection with the center line of Market street; thence southerly and westerly along the center line of Market street to Valencia street; thence southerly along the center line of Valencia street to the center line of the crossing of Valencia and Hermann
25 streets; thence at a right angle easterly along the center line of Hermann street to a point one hundred and forty-four (144) feet from the easterly line of Valencia street; thence extending in a northerly and easterly direction on a radius of three hundred and ninety-six and eight one-hundredths (396.08) feet to the center line of Stevenson street if produced through private property and the center line of Stevenson street to the westerly line of Brady street; thence diagonally in an easterly direction across Brady street

to the intersection of the east line of Brady street and the center line of Stevenson street produced and Stevenson street; thence along the center line of Stevenson street in a northeasterly direction to the center line of Twelfth street; thence southeasterly along the center line of Twelfth street to the center line of West Mission street; thence in a northerly and easterly direction along the center line of West Mission street and Mission street to the center of the crossing of Mission and Ninth streets; thence in a southerly and easterly direction along the center line of Ninth street to the center of the crossing of Ninth and Minna streets; thence in a northerly and easterly direction along the center line of Minna street to Sixth street; thence in a southerly and easterly direction along the center line of Sixth street to the center of the crossing of Sixth and Howard streets; thence in a northerly and easterly direction along the center line of Howard street to the center of the crossing of Howard and First streets; thence in a southerly and easterly direction along the center line of First street to the center of the crossing of First and Folsom streets; thence easterly along the center line of Folsom street to Steuart street; thence in a northerly and westerly direction along the center line of Steuart street to a point one hundred and eighty-three (183) feet and four (4) inches northerly from the northerly line of Folsom street; thence easterly through private property to the waters of the bay; thence along the shore line of the waters of the bay in a northerly and westerly direction to the point of commencement."

Subsequently said Board of Supervisors duly and regularly adopted and enacted an Ordinance No. 31 (new series). Said ordinance was duly and regularly approved and became a law on July 5, 1906; and said ordinance was entitled:

"Regulating the Construction, Erection, Enlargement, Raising, Alteration, Repair, Removal, Maintenance, Use and Height of Buildings; Regulating Character and Use of Materials in and for Buildings; Establishing Fire Limits, and Repealing All Ordinances in Conflict With This Ordinance."

Said Ordinance No. 31 (new series) in section 3 thereof reenacted and continued in full force and effect section 1 of Ordinance No. 1198, and said section 3 of Ordinance No. 31 (new series) remained in full force and effect until December 22, 1909. Thereafter said Board of Supervisors duly and regularly adopted and enacted an Ordinance No. 1008 (new series). Said ordinance was duly and regularly approved and became a law on December 22, 1909, and said ordinance was entitled:

"Regulating the Construction, Erection, Enlargement, Raising, Alteration, Repair, Removal, Maintenance, Use and Height of Buildings; Regulating Character and Use of Materials in and for Buildings; Establishing Fire Limits, and Repealing all Ordinances in Conflict with this Ordinance."

Section 3 of said Ordinance No. 1008 (new series) has never been repealed and has been ever since said December 22, 1909, and now is in full force and effect. Said section 3 of said Ordinance No. 1008

(new series) at all times read and provided and now reads and provides as follows:

"Section 3. That portion of the City and County of San Francisco within the boundary lines in this section hereinafter set forth shall be known as the fire limits within which it shall be unlawful to erect or construct frame or wooden buildings, or to alter, enlarge, repair, add to or build upon any building or buildings except as in this ordinance otherwise provided, viz:

The fire limits shall be bounded by a line commencing at the intersection of the shore line of the Bay of San Francisco with the easterly end of the center line of Greenwich street; running thence westerly along the center line of said Greenwich street to its intersection with the center line of Sansome street; thence southerly along the center line of Sansome street to its intersection with the center line of Broadway; thence westerly along the center line of Broadway to the center line of Cordelia street; thence southerly along the center line of Cordelia street to its intersection with the center line of Pacific street; thence westerly along the center line of Pacific street to the center of the crossing of Pacific and Powell streets; thence southerly along the center line of Powell street to the center of the crossing of Powell and Sacramento streets; thence easterly along the center line of Sacramento street to the center line of the crossing of Sacramento and Stockton streets; thence southerly along the center line of Stockton street to a point distant one hundred and thirty-seven and one-half (137½) feet northerly from the northerly line of Bush street; thence westerly parallel with Bush street on a line distant one hundred and thirty-seven and one-half (137½) feet northerly from the northerly line of Bush street to the center line of Van Ness avenue; thence at right angles southerly along the center line of Van Ness avenue to the intersection of the center line of Fell street; thence westerly along the center line of Fell street to the center of the crossing of Fell and Franklin streets; thence southerly along the center line of Franklin street to the center of the crossing of Franklin and Page streets; thence westerly along the center line of Page street to the center of the crossing of Page and Gough streets; thence southerly along the center line of Gough street to its intersection with the center line of Market street; thence southerly and westerly along the center line of Market street to Valencia street; thence southerly along the center line of Valencia street to the center line of the crossing of Valencia and McCoppin streets; thence at a right angle easterly along the center line of McCloppin street to a point one hundred and forty-four (144) feet easterly from the easterly line of Valencia street; thence extending in a northerly and easterly direction on a radius of three hundred and ninety-six and eight one-hundredths (396.08) feet to the center line of Stevenson street if produced through private property, and along the center line of Stevenson street, to the westerly line of Brady street; thence diagonally in an easterly direction across Brady street to the intersection of the east line of Brady street and the center line of Stevenson street produced and Stevenson street; thence along the center line of Stevenson street in a

northeasterly direction to the center line of Twelfth street; thence southeasterly along the center line of Twelfth street to the center line of Otis street; thence in a northerly and easterly direction along the center line of Otis street and Mission street to the center of the crossing of Mission and Ninth streets; thence in a southerly and easterly direction along the center line of Ninth street to the center of the crossing of Ninth and Minna streets; thence in a northerly and easterly direction along the center line of Minna street to Sixth street; thence in a southerly and easterly direction along the center line of Sixth street to the center of the crossing of Sixth and Howard streets; thence in a northerly and easterly direction along the center line of Howard street to the center of the crossing of Howard and First streets; thence in a southerly and easterly direction along the center line of First street to the center of the crossing of First
31 and Folsom streets; thence easterly along the center line of Folsom street to the center line of Steuart street; thence in a northerly and westerly direction along the center line of Steuart street to a point one hundred and eighty-three (183) feet and four (4) inches northerly from the northerly line of Folsom street; thence at right angles easterly through private property to the waters of the Bay; thence along the shore line of the waters of the Bay in a northerly and westerly direction to the point of commencement."

The lot of land described in paragraph II of the complaint and every part thereof lies within the fire limits as set out and established by said Ordinance No. 1198, and as reenacted by said section 3 of Ordinance No. 31 (new series), and said lot of land and every part thereof lies within the fire limits as set out and established by said section 3 of Ordinance No. 1008 (new series). The building erected upon said lot of land as alleged in paragraph III of the complaint was erected in or about the month of May, 1906, and was at the time of its erection, ever since has been, and now is a frame building constructed and composed entirely of wood. Said Ordinance No. 1198 was in full force and effect at the time said wooden building was erected and said Ordinance No. 1198 made it
32 unlawful to erect, or maintain said wooden building upon said lot of land; and under said Ordinance No. 1198, and said Ordinance No. 31 (new series) and said Ordinance No. 1008 (new series) it has ever since been and is now unlawful to maintain said wooden building on said lot of land.

The Board of Supervisors of the City and County of San Francisco have duly and regularly adopted and enacted an Ordinance No. 4170 (new series). Said ordinance was duly and regularly approved and became a law on May 8, 1917, and said ordinance was and is entitled:

"Amending Ordinance No. 1008 (new series) known as 'The Building Law', approved December 22, 1909, by adding thereto a new section to be numbered '301*a*' ".

Said Ordinance No. 4170 (new series) has never been repealed and has been ever since said May 8, 1917, and now is in full force and effect. Said Ordinance No. 4170 (new series) reads and provides as follows:

"Ordinance No. 4170 (New Series).

Amending Ordinance No. 1008 (new series) known as 'The Building Law', approved December 22, 1909, by adding thereto a new section to be numbered '301a'.

Be it ordained by the People of the City and County of San Francisco as follows:

33 'Section 1. A new section is hereby added to Ordinance No. 1008 (new series) known as 'The Building Law' to be numbered 301a to read as follows:

'Section 301a. It shall be unlawful for any person, firm, company or corporation to erect, place or maintain any wooden building or structure of any kind whatsoever in that portion of the City and County of San Francisco described in section 3, part 2 hereof as the Fire Limits.'

It is hereby made the duty of the Board of Public Works to enforce the provisions of this section and said Board of Public Works is hereby authorized and directed to demolish and remove any building or structure affected by this section upon the failure of the owner or owners thereof to comply with the terms of this section; and the cost of said demolition and removal shall constitute a first lien on said building or structure and the material thereof.

Ordinance No. 1139 (new series) approved April 12, 1910, is hereby repealed."

Under the provisions of said Ordinance No. 4170 (new series) it is the duty of the Board of Public Works of the City and County of San Francisco, and of defendants, Timothy A. Bearden, Adolph Judell, and Daniel G. Fraser, as and constituting said Board

34 of Public Works, and their servants, agents and employees, for that purpose designated, to demolish and remove said wooden building aforesaid, and said defendants, unless restrained therefrom, intend to and will proceed to demolish and remove and cause to be demolished and removed said wooden building as in said Ordinance No. 4170 (new series) provided.

Defendants further allege that said wooden building is and constitutes a nuisance in this that it is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life and property, and particularly in this that it is constructed entirely of wood in violation of said Ordinance No. 1198, said Ordinance No. 31 (new series) and said Ordinance No. 1008 (new series), and is highly inflammable and dangerous to the welfare of the tenants and occupants thereof, and constitutes a grave fire risk to surrounding and adjoining buildings and the tenants and occupants thereof.

Wherefore these defendants pray that plaintiffs take nothing and for their costs of suit.

GEORGE LULL,
City Attorney, Attorney for Defendants.

35 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Adolph Judell, being first duly sworn, deposes and says: That he is one of the defendants named herein; that he has read the foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information or belief and as to those matters he believes it to be true; that all of the facts and circumstances stated in said amended answer are within his knowledge and for that reason he makes this verification.

ADOLPH JUDELL.

Subscribed and sworn to before me this 14th day of January, 1918.
[SEAL.]
A. J. NAGLE,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Received copy of within original this 14th day of January, 1918. J. F. Riley and Andrew Maguire, Attorneys for Plaintiffs. Filed Jan. 14, 1918. H. I. Mulcrevy, Clerk. By H. Brunner, Deputy Clerk.

36 [Title of Court and Cause.]

Demurrer to Amended Answer.

Now come the plaintiffs and demur to the amended answer on file herein on the following grounds:

I.

That said answer does not state facts sufficient to constitute a defense.

II.

That the defense or answer attempted to be set forth in paragraph II of said answer does not state facts or set forth denials sufficient to constitute a defense.

III.

That the defense attempted to be set forth in paragraph III of said answer does not state facts or set forth denials sufficient to constitute a defense.

IV.

The the defense attempted to be set forth in paragraph IV of said answer does not state facts or set forth denials sufficient to constitute a defense.

V.

37 That the answer or defense set forth in paragraph VI of said answer down to line 15, page 10 of said answer, does not state facts sufficient to constitute a defense.

VI.

Said answer is uncertain in this: That it cannot be ascertained therefrom in what respects it is an obstruction to the free use of property, nor to what property it is an obstruction; that it cannot be ascertained therefrom how it interferes with the comfortable enjoyment of life and property, nor can it be ascertained therefrom with whose enjoyment of life or with whose enjoyment of property it does interfere; that it cannot be ascertained therefrom in what respects or how it constitutes a grave fire risk to surrounding and adjoining buildings, or to the tenants or occupants thereof, nor can it be ascertained therefrom in what respects it constitutes a fire risk of any kind or character whatsoever; that it cannot be ascertained therefrom how the said building was constructed in violation of Ordinance No. 1198, nor can it be ascertained therefrom what portion of said ordinance was violated by the building of said structure; that it cannot be ascertained therefrom how, or in what respects it violates the provision of Ordinance No. 31 or of Ordinance No. 1008; that it cannot be ascertained therefrom what portion of the said
38 Ordinance No. 4170 make it the duty of the Board of Public Works to remove said building, nor what portion of said ordinance makes it the duty of any of said defendants, or their servants, or their agents or their employees to demolish or remove said building; that it cannot be ascertained therefrom what portion of said Ordinance No. 4170 referred to in paragraph III of said answer gives unto them the authority to remove said building; that it cannot be ascertained therefrom what portion of said Ordinance No. 4170 referred to in paragraph IV of said answer vests in them the authority to proceed to remove or demolish said building; that it cannot be ascertained therefrom how, or in what respects, said Ordinance No. 1198 made it unlawful to erect or maintain said wooden building upon said lot of land; that it cannot be ascertained therefrom what part of said ordinance so made it unlawful to so erect or maintain said wooden building; that it cannot be ascertained therefrom how the said wooden building was been unlawfully maintained under said Ordinance No. 1198, nor can it be ascertained therefrom what portion of said Ordinance No. 1198 makes it unlawful or to maintain said wooden building on said lot of land; that it cannot be ascertained therefrom how the erecting or maintaining of said
39 building was unlawful under Ordinance No. 31 set forth in said answer; that it cannot be ascertained therefrom if the defendant intends to allege that the said building has ever since the passage of Ordinance 1198 been unlawfully upon and maintained on said lot of land, or if they intend to allege that it has been ever

since the passage of Ordinance No. 1008 *been* unlawfully maintained on said lots of land.

VI.

That said answer is unintelligible for the reasons set forth in the preceding paragraph V, which said paragraph with the exception of the first six words thereof, is hereby referred to and made a part hereof, as fully for all purposes as if set forth at length herein.

VII.

That said answer is ambiguous for the reasons set forth in the preceding paragraph V, which said paragraph with the exception of the first six words thereof, is hereby referred to and made a part hereof, as fully for all purposes as if set forth at length herein.

Wherefore, plaintiffs pray judgment against the defendants and that their demurrer to said answer be sustained.

ANDREW G. MAGUIRE,
J. F. RILEY,
Attorneys for Plaintiffs.

40 We hereby certify that the foregoing demurrer to the answer is not filed for delay and in our opinion is well taken by point of law.

ANDREW G. MAGUIRE,
J. F. RILEY,
Attorneys for Plaintiffs.

(Endorsed:) Rec'd a copy of within demurrer to amended answer this 27th day of Feb'y, 1918. George Lull, Attorney for Defendants. Filed Feb. 28, 1918. H. I. Mulcrevy, Clerk, By J. F. Dunworth, Deputy Clerk.

[Title of Court and Cause.]

Minute Order Overruling Demurrer to Amended Answer.

Saturday, April 13, 1918.

Court met, Honorable G. E. Crothers, judge, and officers of the court present.

In the following matters heretofore submitted for decision the demurrer to the amended answer is by the court ordered overruled and the motion to strike out parts of the amended answer ordered denied. [Entered in minutes of department No. 14, volume 126, page 100.]

41 [Title of Court and Cause.]

Minute Order Dismissing Cause as to Fictitious Defendants.

Saturday, June 29, 1918.

Court met, Honorable G. E. Crothers, judge, and officers of the court present.

In this cause, pursuant to the filing in court this day of an agreed statement of facts, and counsel present and consenting, this cause is by the court ordered to stand submitted for decision, also a motion that the restraining order be continued in force until determination of appeal, is ordered to stand submitted; and the cause ordered dismissed as to fictitious defendants.

[Entered in minutes of department No. 14, volume 126, page 160.]

[Title of Court and Cause.]

Stipulation for Rendition of Judgment on Agreed Statement of Facts.

It is stipulated and agreed by and between the parties to the above entitled action, that the court may render its decision in the above entitled action on the following

42 *Agreed Statement of Facts.*

(It is understood however that this stipulation does not constitute an admission that any of the facts herein agreed to are relevant or material to the matter at issue.)

I.

That both plaintiffs are now, and at all times mentioned in the complaint were citizens of the United States of America and of the State of California, and are now and at all said times were, residents of the City and County of San Francisco, State of California.

II.

That defendants, Timothy A. Reardon, Adolph Judell and Daniel G. Fraser, are now and have been for more than one year next preceding the filing of the said complaint the duly qualified and acting commissioners of the Board of Public Works in and for the City and County of San Francisco, State of California, and that as such commissioners at all said times mentioned in said complaint have constituted and do now constitute the Board of Public Works of the City and County of San Francisco. Said John P. Horgan is their chief building inspector. That defendant City and County of San Francisco is, and at all times mentioned in said complaint and in
43 the amended answer thereto, was a municipal corporation, in the State of California.

III.

That plaintiffs are now and have been during all times mentioned in said complaint and amended answer the owners in fee simple absolute of that certain parcel of real estate, situate, lying and being in the City and County of San Francisco, State of California, and bounded and described as follows, to wit:

Commencing at the point forming the intersection of the southerly line of Hayes street with the easterly line of Van Ness avenue; running thence southerly on the easterly line of Van Ness avenue one hundred and twenty (120) feet; thence at right angles easterly one hundred (100) feet; thence at right angles northerly one hundred and twenty (120) feet, and thence at right angles westerly and along said southerly line of Hayes street one hundred (100) feet to the point of commencement. Being part of Western Addition Block 69 according to the official maps of the City and County of San Francisco.

IV.

That heretofore, to wit, on or about the month of May, 1906, there was constructed and erected by plaintiffs upon the said
44 described parcel of real estate a substantial one-story wood building, containing nine stores, known and designated as numbers 145 and 147 Hayes street and numbers 130-132-134-136-138-140-142-144 Van Ness avenue, at an expense of twelve thousand (12,000) dollars; that in the month of May, 1906, by and with the consent of defendants and under the written permit and under the supervision of the said Board of Public Works, an oven was constructed and installed by plaintiffs in said building and as a part thereof, at a cost of $700, and said oven ever since has been and is still a part of said building; and that ever since said time the said building has been and now is upon the said lot of land above described and constitutes an improvement thereon. That said building has been ever since its construction leased by plaintiffs to and is now occupied by tenants and is used for lawful business purposes, the tenants in said nine stores being engaged in the sale of goods, wares and merchandise, the automobile repair business, carpenter work, etc., and all duly licensed by the said city and county to conduct said businesses in said stores; and said building yields at this time a substantial monthly rental. That the City and County of San Francisco has ever since the construction thereof, as aforesaid, assessed said building and taxed the same as property, and
45 that the said improvements are now assessed and now taxed as property by said City and County of San Francisco, and that plaintiffs have for over ten years last past paid all taxes levied and assessed thereon as they have become due; that said building has been assessed for the present fiscal year, and plaintiffs will be compelled to pay the taxes for the present fiscal year now due and payable, under penalty of the sale to the state of said property.

V.

That said building is assessed for taxes by the City and County of San Francisco for the present fiscal year for 1918-1919 and the taxes thereon for said year are a lien upon the real estate above described and must be paid by said plaintiffs.

VI.

That the said City and County of San Francisco has since the erection of said building above described erected and maintained and used, and is now maintaining and using in the same district or fire limits (referred to in the alleged ordinance hereinafter and in the amended answer set forth) in and within which said building belonging to plaintiffs is situated, wooden buildings, including two fire-
houses, two wooden buildings used as school rooms, and one
46 police station, in which many human beings are housed and some kept and detained.

VII.

That on October 24, 1917, the said commissioners constituting the said Board of Public Works did, at a meeting of said board regularly held, adopt a so-called resolution in words and figures as follows:

Resolution 55734, Second Series.

Resolved, that Chief Building Inspector John P. Horgan be and is hereby directed to serve notices upon the parties responsible for the shacks at the southeasterly corner of Van Ness avenue and Hayes street known as 145 and 147 Hayes street, and 130, 132, 134, 136, 138, 140, 142 and 144 Van Ness avenue, to raze these buildings within 5 days from the date of the service of notices; also that chief building inspector be and is hereby requested to file immediately with the Board of Public Works an estimate of the cost of razing these shacks.

Adopted October 25, 1917 by the following vote:

Ayes: Commissioners Judell, Fraser and Reardon.
D. R. S.

47

VIII.

That thereafter and on October 29, 1917, said commissioners so constituting the said Board of Public Works did cause to be served on each of the said plaintiffs a written notice in words and figures as follows, to wit:

Office of Board of Public Works.

San Francisco, Cal., Oct. 29, 1917.

To the Owner or Owners of that Certain Building or Structure Maintained on the lot situated at the southeasterly corner of Van Ness avenue and Hayes street in the City and County of San Francisco, and fronting upon both of said named streets:

You are hereby notified that under and by virtue of the authority and direction provided in an ordinance of the City and County of San Francisco, approved May 8, 1917, and entitled, "Ordinance No. 4170, new series, amending Ordinance No. 1008, new series, known as 'The Building Law,' approved December 22, 1909, by adding thereto a new section to be numbered, '301-a'," the Board of Public Works of said City and County will demolish and remove that certain building or structure owned and maintained by you, as the owner or owners thereof, on the lot situated at the southeasteriy cor-
ner of Van Ness avenue and Hayes street in said city and
48 county and fronting upon both streets, upon the failure of you, as such owner or owners, to demolish and remove the same within five days from the service of this notification.

A copy of the said ordinance is hereto attached for reference by you to the provisions thereof.

[SEAL.] BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO.
By JOHN P. HORGAN,
Chief Building Inspector.

Served upon C. S. Maguire on the 29th day of October, 1917, by Louis Bailey, Inspector of Buildings.

Attached to said notice was a copy of said ordinance referred to in said notice which is in words and figures as follows:

Bill No. 4515. Ordinance No. 4170. (New Series.)

Amending Ordinance No. 1008 (new series) known as "The building law", approved December 22, 1909, by adding thereto a new section to be numbered "301*a*".

Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. A new section is hereby added to Ordinance No. 1008 (new series) known as "The Building Law" to be numbered 301*a* to read as follows:

49 Section 301*a*. It shall be unlawful for any person, firm, company or corporation to erect, place or maintain any wooden building or structure of any kind whatsoever in that portion of the City and County of San Francisco described in section 5, part 2 hereof as the Fire Limits."

It is hereby made the duty of the Board of Public Works to enforce the provisions of this section and said Board of Public Works is hereby authorized and directed to demolish and remove any building or structure affected by this section upon the failure of the owner or owners thereof to comply with the terms of this section; and the cost of said demolition and removal shall constitute a first lien on said building or structure and material thereof.

Ordinance No. 1139 (new series) approved April 12, 1910, is hereby repealed.

Finally passed—Board of Supervisors, San Francisco, May 7, 1917.

Ayes: Supervisors Brandon, Deasy, Gallagher, Hayden, Hilmer, Hocks, Hynes, Kortick, Lahaney, McLaren, Mulvihill, Nelson, Nolan, Power, Suhr, Walsh, Welch, Wolfe.

J. S. DUNNIGAN,
Clerk.

Approved, San Francisco, May 8, 1917.

JAMES ROLPH, JR.,
Mayor.

50

IX.

That on the same day, namely, October 29, 1917, said commissioners did cause to be served on each of the tenants of plaintiffs occupying said nine stores, a written notice in words and figures as follows:

City and County of San Francisco.

Department of Public Works.

Bureau of Building Inspection.

To the Tenant or Tenants of Building and Premises Situate on the east line of Van Ness ave. south of Hayes street, and known and numbered as 134 Van Ness avenue of the City and County of San Francisco:

You are hereby notified that the owner of the above described premises has been notified to demolish and remove said building or structure within five days, and in accordance therewith you will take whatever steps you deem necessary for the protection of your property upon said described premises before such demolition and removal.

BOARD OF PUBLIC WORKS,
By JOHN P. HORGAN,
Chief Building Inspector.

X.

That the said defendants will, unless restrained by this court, proceed to demolish and remove the said buildings under the
51 claim of authority claimed by defendants to be vested in them by said Ordinance No. 4170.

XI.

That the Charter of the City and County of San Francisco now provides, and at all the times mentioned in said complaint and amended answer has provided in subdivision 5 of section 1 of Chapter II of article II thereof, as follows, to wit:

"Section 1. Subject to the provisions, limitations and restrictions in this Charter contained, the Board of Supervisors shall have power:

5. To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained, and to prohibit the same within such limits. Such limits when once established shall not be changed, except by extension."

Pursuant to the power in them vested by this provision of the Charter, and long prior to the construction of said frame building herein referred to, the Board of Supervisors of the City and County of San Francisco duly and regularly adopted and enacted an Ordinance No. 1198. Said ordinance was duly and regularly approved on May 5, 1904, and said ordinance was entitled:

"Defining the Fire Limits of the City and County of San Francisco."

52 Said Ordinance No. 1198 at all times read and provided:

"Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. The fire limits shall be bounded by a line commencing at the intersection of the shore line of the Bay of San Francisco with the easterly end of Greenwich street; running thence westerly along the center line of said Greenwich street to its intersection with the center line of Sansome street; thence southerly along the center line of Sansome street to its intersection with the center line of Broadway; thence westerly along the center line of Broadway to the center line of Virginia place; thence southerly along the center line of Virginia place to its intersection with the center line of Pacific street; thence westerly along the center line of Pacific street to the center of the crossing of Pacific and Powell streets; thence southerly along the center line of Powell street to the center of the crossing of Powell and Sacramento streets; thence easterly along the center line of Sacramento street to the center of the crossing of Sacramento and Stockton streets; thence southerly along the center line of Stockton street to a point distant one hundred and thirty-seven and one-half (137½) feet northerly from the northerly line of Bush street;

53 thence westerly parallel with Bush street on a line distant one hundred and thirty-seven and one-half (137½) feet northerly from the northerly line of Bush street to the center line of Van Ness avenue; thence at right angles southerly along the center line of Van Ness avenue to the intersection of the center line of Fell street; thence westerly along the center line of Fell street to the center of the crossing of Fell and Franklin streets; thence south-

erly along the center line of Franklin street to the center of the crossing of Franklin and Page streets; thence westerly along the center line of Page street to the center of the crossing of Page and Gough streets; thence southerly along the center line of Gough street to its intersection with the center line of Market street; thence southerly and westerly along the center line of Market street to Valencia street; thence southerly along the center line of Valencia street to the center line of the crossing of Valencia and Hermann streets; thence at a right angle easterly along the center line of Hermann street to a point one hundred and forty-four (144) feet from the easterly line of Valencia street; thence extending in a northerly and easterly direction on a radius of three hundred and ninety-six and eight one-hundredths (396.08) feet to the center line of
54 Stevenson street if produced through private property and the center line of Stevenson street to the westerly line of Brady street; thence diagonally in an easterly direction across Brady street to the intersection of the east line of Brady street and the center line of Stevenson street produced and Stevenson street; thence along the center line of Stevenson street in a northeasterly direction to the center line of Twelfth street; thence southeasterly along the center line of Twelfth street to the center line of West Mission street; thence in a northerly and easterly direction along the center line of West Mission street and Mission street to the center of the crossing of Mission and Ninth streets; thence in a southerly and easterly direction along the center line of Ninth street to the center of the crossing of Ninth and Minna streets; thence in a northerly and easterly direction along the center line of Minna street to Sixth street; thence in a southerly and easterly direction along the center line of Sixth street to the center of the crossing of Sixth and Howard streets; thence in a northerly and easterly direction along the center line of Howard street to the center of the crossing of Howard and First streets; thence in a southerly and easterly direction along the center line of First street to the center of the crossing of First and
55 Folsom streets; thence easterly along the center line of Folsom street to Steuart street; thence in a northerly and westerly direction along the center line of Steuart street to a point one hundred and eighty-three (183) feet and four (4) inches northerly from the northerly line of Folsom street; thence easterly through private property to the waters of the bay; thence along the shore line of the waters of the bay in a northerly and westerly direction to the point of commencement.

Section 2. Every person, company or corporation violating the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred ($500) dollars, or by imprisonment not exceeding six (6) months, or by both such fine and imprisonment."

Said ordinance was not repealed or modified until July 5, 1906.

That the land described in said complaint is and was within the territory known as "Fire Limits" and described in said Ordinance No. 1198.

Subsequently said Board of Supervisors duly and regularly adopted and enacted an Ordinance No. 31 (new series). Said ordinance was duly and regularly approved on July 5, 1906, and said ordinance was entitled:

56 "Regulating the Construction, Erection, Enlargement, Raising, Alteration, Repair, Removal, Maintenance, Use and Height of Buildings; Regulating Character and Use of Materials in and for Buildings; Establishing Fire Limits, and Repealing All Ordinances in Conflict With This Ordinance."

Said Ordinance No. 31 (new series) in section 3 thereof reenacted section 1 of Ordinance No. 1198, and said section 3 of Ordinance No. 31 (new series) was not repealed or modified until December 22, 1909.

Thereafter said Board of Supervisors duly and regularly adopted and enacted an Ordinance No. 1008 (new series). Said ordinance was duly and regularly approved on December 22, 1909, and said ordinance was entitled:

"Regulating the Construction, Erection, Enlargement, Raising, Alteration, Repair, Removal, Maintenance, Use and Height of Buildings; Regulating Character and Use of Materials in and for Buildings; Establishing Fire Limits, and Repealing all Ordinances in Conflict with this Ordinance."

Section 3 of said Ordinance No. 1008 (new series) has never been repealed. Said section 3 of said Ordinance No. 1008 (new series) at all times read and provided and now reads and provides as follows:

57 Section 3. That portion of the City and County of San Francisco within the boundary lines in this section hereinafter set forth shall be known as the fire limits within which it shall be unlawful to erect or construct frame or wooden buildings, or to alter, enlarge, repair, add to or build upon any building or buildings except as in this ordinance otherwise provided, viz:"

The premises described in said complaint are within the territory described and designated in said Ordinance No. 1008 as "Fire Limits." Said building described in said complaint was at the time of its erection, ever since has been and is now a frame building, composed of wood, glass for windows, and brick for said oven and chimney.

The Board of Supervisors of the City and County of San Francisco have duly and regularly adopted and enacted an Ordinance No. 4170 (new series). Said ordinance was duly and regularly approved on May 8, 1917, and said ordinance was and is entitled:

"Amending Ordinance No. 1008 (new series) known as 'The Building Law', approved December 22, 1909, by adding thereto a new section to be numbered '301*a*'."

Said Ordinance No. 4170 (new series) has never been repealed or modified. Said Ordinance No. 4170 (new series) reads and provides as follows:

"Ordinance No. 4170 (new series).

58 Amending Ordinance No. 1008 (new series) known as 'The Building Law,' approved December 22, 1909, by adding thereto a new section to be numbered '301*a*'.

Be it ordained by the People of the City and County of San Francisco as follows:

'Section 1. A new section is hereby added to Ordinance No. 1008 (new series) known as 'The Building Law' to be numbered 301*a* to read as follows:

'Section 301*a*. It shall be unlawful for any person, firm, company or corporation to erect, place or maintain any wooden building or structure of any kind whatsoever in that portion of the City and County of San Francisco described in section 3, part 2 hereof as the Fire Limits.'

It is hereby made the duty of the Board of Public Works to enforce the provisions of this section and said Board of Public Works is hereby authorized and directed to demolish and remove any building or structure affected by this section upon the failure of the owner or owners thereof to comply with the terms of this section; and the cost of said demolition and removal shall constitute a first lien on said building or structure and the material thereof.

59 Ordinance No. 1139 (new series) approved April 12, 1910, is hereby repealed.

ANDREW G. MAGUIRE,
J. F. RILEY,
Attorneys for Plaintiffs.
GEORGE LULL,
Attorney for Defendants.

San Francisco, June 26, 1918.

(Endorsed:) Filed in open court June 29th, 1918. H. I. Mulcrevy, Clerk, By F. B. Lorigan, Deputy Clerk.

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

The above entitled cause having been submitted to the court on an agreed statement of facts, the court herewith makes is findings of fact and conclusions of law as follows:

Findings of Fact.

That a stipulation in writing was entered into by the parties in this action concerning the facts involved and the issues raised by the pleadings, which stipulation was and is in the words and figures following, to wit:

(Here followed agreed statement of facts as set forth hereinbefore.)

60 From the foregoing facts the court finds the following as its

Conclusions of Law.

That said building was erected and constructed by plaintiffs in violation of law, to wit: in violation of the provisions of said Ordinance No. 1198 and subdivision 5, section 1, chapter II of article II of the Charter of the City and County of San Francisco, and that said building has been ever since its erection, and now is, maintained by said plaintiffs in violation of law; that plaintiffs are not entitled to an injunction or to any relief in a court of equity and that defendants are entitled to judgment herein.

Let judgment be entered accordingly.

Done in open court this 23rd day of August, 1918.

GEO. E. CROTHERS,
Judge of the Superior Court.

61 (Endorsed:) Filed Aug. 23, 1918. H. I. Mulcrevy, Clerk. By J. F. Dunworth, Deputy Clerk.

[Title of Court and Cause.]

Judgment.

In the above entitled cause the court having heretofore duly made, given and signed its findings of fact and conclusions of law and having ordered that judgment be entered in accordance therewith:

Now therefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that plaintiffs take nothing by this action, and that judgment be and the same is hereby entered in favor of defendants.

Upon motion of counsel for plaintiffs that the temporary injunction heretofore granted be continued in force pending an appeal by plaintiffs from this judgment to the Supreme Court of the State of California, and upon the further assurance of said counsel for plaintiffs that they will expedite said appeal and join with counsel for defendants in a petition to have said appeal advanced and set for hearing on the January, 1919, calendar of said Supreme Court;

62 it is further ordered that said temporary injunction be continued in full force and effect and that defendants and each of them, their servants, agents and employees be and they are hereby restrained and enjoined from entering in and upon the lot of land and premises in the complaint herein particularly described for the purpose of demolishing, destroying, removing or tearing down the buildings now standing thereon, and from interfering with the quiet and peaceful possession and enjoyment thereof by plaintiffs and plaintiffs' tenants, pending the determination of plaintiffs' appeal from this judgment to the Supreme Court of the State of California; provided however that if defendants file a reply brief in said appeal within forty days after plaintiffs have filed their opening brief therein, and plaintiffs thereafter fail to file their closing brief on or

before December 31st, 1918, or if plaintiffs fail or refuse to join with defendants in a petition to said Supreme Court to advance said appeal and to have said appeal placed on the January, 1919, calendar of said Supreme Court for argument, then this temporary injunction shall be of no further force and effect and shall stand dis-
63 solved.

Done in open court this 23rd day of August, 1918.

GEO. E. CROTHERS,
Judge of the Superior Court.

Recorded Aug. 23, 1918, 3:47 o'clock P. M., vol. 120, page 327. H. I. Mulcrevy, Clerk, By Chas. A. Siskron, Deputy Clerk.

(Endorsed:) Filed Aug. 23, 1918. H. I. Mulcrevy, Clerk, By J. F. Dunworth, Deputy Clerk.

[Title of Court and Cause.]

Clerk's Certificate to Judgment Roll.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, H. I. Mulcrevy, county clerk of the City and County of San Francisco, State of California, and ex-officio clerk of the Superior Court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause, and recorded in judgment book 120 of said court, at page 327. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said cause.

64 Witness my hand and seal of said Superior Court this 23th day of August, A. D. 1918.

[SEAL.]

H. I. MULCREVY,
Clerk,
By G. A. WEIHE,
Deputy Clerk.

(Endorsed:) Filed August 26, 1918. H. I. Mulcrevy, Clerk, By G. A. Weihe, Deputy Clerk.

Recorded judgment book 120, page 327.

[Title of Court and Cause.]

Notice of Appeal from Judgment.

To the Defendants and George Lull, Attorney for Defendants:

You and each of you will please take notice that the plaintiffs in the above entitled action do hereby appeal to the Supreme Court of the State of California, from the judgment of the above entitled

court given and made and entered on August 23d, 1918, in favor of the defendants in said action and against the plaintiffs, and from the whole thereof except that portion of said judgment continuing in force the temporary injunction heretofore granted and restraining and enjoining the defendants and each of them, and their
65 servants, agents and employees from entering in and upon the lot of land and premises in the complaint described for the purpose of demolishing, destroying, removing or tearing down the buildings now standing thereon, and from interfering with the quiet and peaceful possession and enjoyment thereof by plaintiffs and plaintiffs' tenants, pending the determination of plaintiffs' appeal from said judgment to the Supreme Court of the State of California.

October 8th, 1918.

ANDREW G. MAGUIRE,
J. F. RILEY,
Attorneys for Plaintiffs.

(Endorsed:) Service of the within notice of appeal from judgment this 8th day of October, 1918, is hereby admitted. George Lull, Attorney for Defendants. Filed Oct. 8, 1918. H. I. Mulcrevy, Clerk. By H. Brunner, Deputy Clerk.

65½ *Stipulation to Transcript.*

It is hereby stipulated that the foregoing transcript on appeal is correct; that it contains full, true and correct copies of all the papers therein set forth now on file in the office of the county clerk of the City and County of San Francisco, State of California; that the minute orders therein contained are full, true and correct copies thereof as made and entered in the minutes of the Superior Court; that the said foregoing papers shall constitute the transcript on appeal in this cause and that the appeal may be heard and determined thereon.

It is further stipulated that a sufficient undertaking on appeal, in due form of law, has been properly filed in said cause in the manner and within the time required by law.

Dated, November 6, 1918.

GEORGE LULL,
City Attorney, City and County of San Francisco;
MAURICE T. DOOLING, JR.,
Assistant City Attorney, City and County of San Francisco,
Attorneys for Respondents.
ANDREW G. MAGUIRE,
J. F. RILEY,
Attorneys for Appellants.

67 *Clerk's Certificate to Transcript.*

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, H. I. Mulcrevy, county clerk of the City and County of San Francisco, State of California, and ex-officio clerk of the Superior Court in and for said city and county, hereby certify that I have compared the foregoing transcript with the original papers in said action, now on file in my office, and with the orders therein made and entered on the minutes of said court, and that the papers and orders therein contained are full, true and correct copies of the originals on file in this office, and of the whole thereof.

I further certify that the erasures and interlineations appearing in the foregoing transcript were made before certifying thereto.

I further certify that a sufficient undertaking on appeal, in due form of law, has been properly filed in said cause in the manner and within the time required by law.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court this — day of November, 1918.

[SEAL.]

H. I. MULCREVY,
Clerk.

By —— ——,
Deputy Clerk.

68 First Appellate District, Division One, June 14, 1919.

Civil. No. 2809.

MICHAEL MAGUIRE et al., Plaintiffs and Appellants,

v.

TIMOTHY A. REARDON et al., etc., BOARD OF PUBLIC WORKS, CITY AND COUNTY OF SAN FRANCISCO, Defendants and Respondents.

69 Plaintiffs and appellants brought this action to enjoin respondents, the board of public works, and chief building inspector of the city and county of San Francisco from demolishing a certain wooden building erected and maintained within the fire limits of said city and county. The cause was submitted upon an agreed statement of facts, and this is an appeal from the judgment of the lower court denying the plaintiffs the relief asked for.

The building was erected in May, 1906, immediately following the great fire of that year, at a cost of $12,000, and is a wooden building containing nine stores, producing a substantial rental, the tenants in the said nine stores using the same for lawful business purposes. At the time of its construction, by and with the consent of defendants, and under the written permit and supervision of the said board of public works, an oven was constructed and installed by the plaintiffs

in said building, and as a part thereof, at a cost of $700. By its construction the oven became, and at the time of the filing of the complaint still was, a part of the building.

Acting under and by virtue of the authority and direction of an ordinance of the city and county of San Francisco, approved May 8, 1917 (Ord. No. 4170, N. S.), and known as "The Building Law", the board of public works adopted a resolution directing plaintiffs to raze the buildings in question within five days of the date of the service of notice thereof. The adoption of this resolution was followed by notice served on plaintiffs, to the effect that the board would demolish and remove the buildings upon the failure of the plaintiffs to remove the same within five days of the date of the notification. Notice of the intention of the board of public works was also served on each of the tenants of the building. Application to the lower court for an injunction to prevent the board from carrying out its determination, and the judgment of the lower court, refusing the same, followed.

The question thus clearly presented to this court for determination is whether, or not, wooden buildings, erected within the fire limits, may be summarily destroyed by duly authorized public officers of the municipality. Appellant maintains that the only ordinance in force covering the subject at the time of the erection of the building did not prohibit the erection of a one-story, wooden building such as the one in question; and that there is nothing in the charter of the city and county of San Francisco prohibiting such construction. These propositions must be determined adversely to the contention of the appellants.

70 The charter of the city and county of San Francisco now provides, and at all times mentioned in the agreed statement of facts, did provide, in subdivision 5 of section 1, chapter II, article II, as follows, to-wit:

"Section 1. Subject to the provisions, limitations and restrictions in this charter contained, the Board of Supervisors shall have power

* * *

5. To fix limits within which wooden buildings or structures shall not be erected, placed, or maintained, and to prohibit the same within such limits. Such limits when once established shall not be changed except by extension."

Pursuant to the power thus given by the charter, and long prior to the construction of the frame building herein referred to, the board of supervisors of the city and county of San Francisco duly and regularly adopted and enacted an ordinance, No. 1198. Said ordinance was approved on May 5, 1904, and was entitled: "Defining the fire limits of the City and County of San Francisco." This ordinance provides in section 1 thereof that: "The fire limits shall be bounded by a line commencing * * *" followed by an apt description of metes and bounds. The building in question here is situated within the described district. Section 2 of the ordinance provides a penalty for violating the provisions of the ordinance, but

does not otherwise provide that wooden buildings or structures shall not be erected, placed or maintained within the district described. The above provisions of the charter and this same ordinance were considered by this court in Bancroft v. Goldberg, Bowen & Co., 16 Cal. App. Dec. 37, and it was there held that the effect of the ordinance and the charter provisions is to make the erection or maintenance of a wooden building within the fire limits, as defined in the ordinance, unlawful; that the function of the ordinance is to define the fire limits, and when these limits are thus defined the charter itself makes it unlawful to erect or maintain wooden buildings within such limits. The court said:

"No express prohibition in the ordinance is required. The charter makes the prohibition. * * * So when the board of supervisors adopted the ordinance defining the fire limits, it was exercising its power 'to fix the limits within which wooden buildings or structures shall not be erected, placed, or maintained'. It was thus unlawful to maintain the building in question upon the leased premises at the date of the lease and at all times subsequently."

The supreme court granted a rehearing in the above case and in Bancroft v. Goldberg, Bowen & Co., 166 Cal. 416, sustained the decision of this court to the effect that the building there under consideration was erected in violation of the provisions of the building ordinance of the city and county of San Francisco.

The appellants argue that ordinance No. 4170, N. S., under which the respondents, the board of public works, are proceeding to demolish this building is unconstitutional for various reasons. The supreme court, in Bancroft v. Goldberg, Bowen & Co., supra, further held that the ordinance requiring the building which had been erected subsequently to April, 1906, in violation of the existing laws of the city and county, to be demolished or removed on or before a certain date, is a declaration of the policy of the board of supervisors that all temporary wooden buildings, erected in violation of law within the fire limits after the great conflagration of April 18, 1906, are a menace to the safety of the city, no longer finding any possible warrant in the necessities of the people, and that they constituted public nuisances which should be abated as soon as is reasonably possible.

[1] We see no distinction between the building under consideration in that case, and the one which is the subject of this litigation. The building constitutes a public nuisance and a court of equity will refuse any relief designed to perpetuate its maintenance, regardless of the validity of the ordinance. (Varney & Green
71 v. Williams, 155 Cal. 318.) It would appear, therefore, that the appellants are not in position to attack said ordinance No. 4170, for the reason that, having erected a wooden building in violation of law, and having continued in violation of law to maintain it to the present time, they cannot seek aid of a court of equity to maintain it. (Civ. Code, sec. 3517.)

[2] Assuming, however, that appellants might suggest the unconstitutionality of the ordinance, and for the reasons urged on this ap-

peal, we are satisfied that there is no merit in any of the points made. The ordinance is not discriminatory in providing for the general demolition and removal of wooden buildings, and not referring to buildings of other inflammable material. (Baumgartner v. Hasty, 100 Ind. 575.)

[3] The ordinance is not retroactive, for the building sought to be removed by the city was erected after the passage of the ordinance defining the fire limits. (Bancroft v. Goldberg, Bowen & Co., supra.)

[4] The ordinance does not deprive appellants of any vested rights without due process of law. "In removing a building erected in violation of law * * * no private right is invaded, because none could grow out of the illegal act." (Baumgartner v. Hasty, supra; Brooklyn v. Furey, 30 N. Y. Supp. 349.) Such building erected in violation of an ordinance fixing the fire limits may be torn down and removed without any judicial proceeding whatever. (Eikenlaub v. City of St. Joseph, 113 Mo. 395; Lemmon v. Guthrie Center, 84 N. W. 986.)

Appellants contend that because the city permitted them to erect a building, there was at least an implied contract upon its part that they should be permitted to maintain it, including the right to enter into contracts with others for the use and enjoyment of it. This contention, like all the others made by the appellants, has been decided to the contrary.

"The charter of the city and county of San Francisco authorizes the board of supervisors to fix the limits within which wooden buildings or structures shall not be erected or maintained, and provides that 'such limits when once established shall not be changed except by extension'. (Charter, chap. II, sec. 5.) So that it would seem that the supervisors would have had no authority after the fire, even by ordinance, to permit the erection of any wooden building within the limits previously defined as the fire limits, the charter provision limiting their powers in this behalf. But they did not even purport to so do by ordinance, which even if there were no charter provisions would be essential to any change in existing ordinances on the subject. All that there was in this case in effect was the unofficial announcement of the municipal authorities that they would regard the law on the subject suspended for the time being and would not attempt to enforce it, which was followed by the actual failure on the part of such authorities to enforce the same. The good faith both of the authorities and those erecting wooden buildings under the assurance thus given is not to be questioned in the slightest degree. It may freely be conceded that the emergency was such as to morally justify the authorities and those acting upon their assurance in doing as they did. But of course the law could not be changed in any such way. The ordinances on the subject continued in force unaffected by the unofficial announcement in the slightest degree, with the result that the construction of this building on this lot, which was expressly provided for in the lease, was 'contrary to an express provision of law', and therefore 'not lawful' (Civ. Code, sec. 1667), on

May 17th, 1906, and at all times thenceforth. We regard this proposition as so elementary in its nature as to require no citation of authority to uphold it. Certainly no case cited by learned
72 counsel for plaintiff tends to support a contrary law." (Howell v. City of Hamburg Co., 165 Cal. 175.)

Any contracts made by the appellants with their tenants must be deemed to have been made with the knowledge that the building was illegally maintained, and subject to the right of the city to remove it at any time. The city was not estopped to destroy the building; the police power cannot be bartered away even by express contract, and the power to remove a wooden building erected within the fire limits is an exercise of the police power of the first importance, since it immediately concerns the safety of persons and property. (Fire Dept. v. Atlas Co., 106 N. Y. 566, 13 N. E. 329; Boston Beer Co. v. Mass., 24 L. Ed. 989, 992; Union Cemetery Association v. Kansas City, 161 S. W. 261.)

Appellants' last contention is that the board of supervisors has no power to authorize the board of public works to demolish buildings. As before pointed out, the board of supervisors has power under the charter "to fix the limitations within which wooden buildings or structures may not be erected, placed or maintained", and to prohibit the same within such limitations. "The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors * * * of the supervision of any and all building construction in the city and county.' (Charter, subd. 5, sec. 9, chap. I, art. VI.) "The chief engineer, assistant chief engineers, battalion chiefs and the fire marshal shall constitute a board of fire wardens, with power to inspect, and report to the board of public works, as to the safety of buildings and other structures within the city and county." (Sec. 1, chap. VI, art. IX of the charter.)

"All the legislative power of the city is by the charter vested in the board of supervisors (art. II, chap. I, sec. 1). By virtue of this clause, the constitutional grant of the police powers of the state to the city goes directly to and vests in the board, which thereby becomes possessed of the right to exercise within the city limits the entire police power of the state subject only to the control of general laws." (Odd Fellows Cemetery Assn. v. San Francisco, 140 Cal. 226, 230-231; In re Montgomery, 163 Cal. 457.) [5] It seems but logical to conclude, therefore, that the board of supervisors had ample power, by the adoption of the ordinance, to confer upon the board of public works full and complete authority to take and provide the required steps to remove the building in question, and thereby abate the nuisance arising from its erection and maintenance contrary to law.

The judgment is affirmed.

WASTE, *P. J.*

We concur:

RICHARDS, *J.*

KERRIGAN, *J.*

73

Copy.

In the District Court of Appeal of the State of California in and for the First Appellate District, Division One.

No. 2809.

MICHAEL MAGUIRE and C. S. MAGUIRE, Plaintiffs and Appellants,

vs.

TIMOTHY A. REARDON et al., etc., BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO, Defendants and Respondents.

By the Court:

The petition for a rehearing in the above entitled cause is denied. Dated July 14, 1919.

WILLIAM H. WASTE,
Presiding Justice.

74

Copy.

In the Supreme Court of the State of California. In Bank.

S. F., No. 8925.

1 Civ., No. 2809.

MAGUIRE

vs.

REARDON et al.

By the Court:

The petition to have the above entitled cause heard and determined by this Court after judgment in the District Court of Appeal of the First Appellate District, Division One, is denied.

Dated this 11th day of August, 1919.

All concur except Wilbur, J., absent.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 13th day of Aug. A. D. 1919.

B. GRANT TAYLOR,
Clerk.

[SEAL.]

By MACKRILLE,
Chief Deputy Clerk.

75

Copy.

In the District Court of Appeal of the State of California in and for the First Appellate District, Division One.

No. 2809.

San Francisco, June 14th, 1919.

MICHAEL MAGUIRE and C. S. MAGUIRE, Plaintiffs and Appellants,

vs.

TIMOTHY A. REARDON et al., etc., BOARD OF PUBLIC WORKS, CITY AND COUNTY OF SAN FRANCISCO, Defendants and Respondents.

On Appeal from the Superior Court in and for the City and County of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by

WASTE, *P. J.*

We concur:
RICHARDS, *J.*
KERRIGAN, *J.*

Whereupon, it is ordered, adjudged and decreed by the Court that the Judgment of the Superior Court in and for the City & County of San Francisco in the above entitled cause, be and the same is hereby affirmed.

The respondents to recover costs of this appeal.

I, J. B. Martin, Clerk of the District Court of Appeal of the State of California, in and for the First Appellate District, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 14th day of June, 1919, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 14th day of August, A. D. 1919.

[SEAL.]

J. B. MARTIN,
Clerk.
By WILLARD W. SHEA,
Deputy.

76 In the District Court of Appeal, State of California, First Appellate District, Division One.

MICHAEL MAGUIRE and C. S. MAGUIRE, Plaintiffs, and Plaintiffs in Error,

vs.

TIMOTHY A. REARDON, ADOLPH JUDELL and DANIEL G. FRASER, as Commissioners Constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan as Chief Building Inspector; John Doe, James Doe and William Doe and City and County of San Francisco (a Municipal Corporation), Defendants and Defendants in Error.

To the Honorable the Presiding Justice of the District Court of Appeal of the State of California, First Appellate District, Division One:

Now come the plaintiffs and plaintiffs in error, Michael Maguire and C. S. Maguire, by J. F. Riley, their Attorney, and respectfully show: That on the 23rd day of August, 1918, a judgment was duly given and made whereby the Superior Court of the City and County of San Francisco, State of California, did deny and refuse to the said plaintiffs any and all relief for and on account of their complaint herein, and did give judgment for the defendants in said action, with their costs; that thereafter plaintiffs did duly and regularly appeal from said judgment to the Supreme Court of the State of California, and said Supreme Court did, thereafter, in the exercise of its Constitutional powers, order said cause transferred to the District Court of Appeal of said State, in and for the First Appellate District, Division One, of said Court for hearing and decision; and that thereafter the said District Court of Appeal of the State of California, in and for the First Appellate District, did affirm the judgment of the said Superior Court of the said City and County of San Francisco; that thereafter the plaintiffs did petition the Supreme Court of the State of California for a hearing by said Supreme Court; that there-
77 after said Supreme Court of the State of California, did deny the said petition and application of these plaintiffs for a hearing before said Supreme Court.

Your Petitioners feeling themselves aggrieved by the said judgments of said Supreme Court and of said District Court of Appeal and of said Supreme Court, entered therein as aforesaid, hereby petition the District Court of Appeal of the State of California, in and for the First Appellate District, Division One, for an order allowing them to prosecute a Writ of Error to the Supreme Court of the United States of America, under the laws of the United States in such case made and provided.

Wherefore, the premises considered, your petitioners pray, that a writ of error be issued, and that an appeal in this behalf to the Supreme Court of the United States, for the correction of the errors

complained of and herewith assigned be allowed, and that an order be made approving the bond furnished by your petitioners and staying all further proceedings until the determination of said Writ of Error by the said Supreme Court of the United States, and that a transcript of the record, proceedings and papers duly authenticated, may be sent to the Supreme Court of the United States.

JOHN F. RILEY,
Attorney for Plaintiffs in Error.

MICHAEL MAGUIRE AND
C. S. MAGUIRE,
Plaintiffs in Error,
By JOHN F. RILEY,
Attorney for Plaintiffs in Error.

San Francisco, October 11, 1919.

77½ [Endorsed:] Original. No. 2809. In the District Court of Appeal, State of California, First Appeliate District, Division One. Michael Maguire et al., Appellants & Plaintiffs, vs. Timothy A. Reardon et al., etc., et al., Respondents & Defendants. Petition for Allowance of Writ of Erorr to The United States Supreme Court. J. F. Riley, Attorney for Petitioners, 717 Pacific Building, San Francisco, California. Filed Oct. 14, 1919. J. B. Martin, clerk, by Walter S. Chisholm.

78 In the District Court of Appeal, State of California, First Appellate District, Division One.

MICHAEL MAGUIRE and C. S. MAGUIRE, Plaintiffs and Plaintiffs in Error,

vs.

TIMOTHY A. REARDON, ADOLPH JUDELL and DANIEL G. FRASER, as Commissioners Constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan as Chief Building Inspector; John Doe, James Doe and William Doe, and City and County of San Franicsco (a Municipal Corporation), Defendants and Defendants in Error.

Assignment of Errors.

And now come the Plaintiffs in error Michael Maguire and C. S. Maguire by J. F. Riley, their Attorney, and say that there is manifest error in the judgment of the Superior Court of the City and County of San Francisco, and of the District Court of Appeal of the State of California, in and for the First Appeilate District, Division One, from which latter Court this Writ of Error is sued out, and of the Supreme Court of the State of California, and assign the following errors which plaintiffs in error aver occurred during and at

the trial thereof, upon which they rely to reverse the judgment entered herein as of record.

The action was brought to enjoin the Board of Public Works and the Chief Building Inspector of the City and County of San Francisco, State of California, and said City and County of San Francisco, from demolishing a certain wooden building erected and maintained within a district known as the "Fire limits" of said City and County.

The building was a substantial building consisting of many stores, rented to various tenants for legitimate business purposes.

The building was erected in 1906.

On May 8, 1917, an Ordinance known as Ordinance No. 4170, New Series, was enacted by the Board of Supervisors of the said City and County, and in October of the same year, the plaintiffs
79 were notified by the Board of Public Works of said City and County, "that by virtue of the authority and direction provided in an ordinance of the City and County of San Francisco, approved May 8, 1917, and entitled, "Ordinance No. 4170, New Series," the said Board of Public Works would demolish and remove the said building upon the failure of the plaintiffs to demolish and remove the same within five days from the service of the notification.

Said Ordinance No. 4170, reads as follows:

"Bill No. 4515. Ordinance No. 4170. (New Series.)

Amending Ordinance No. 1008 (new series) known as "The building law", approved December 22, 1909, by adding thereto a new section to be numbered "301*a*".

Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. A new section is hereby added to Ordinance No. 1008 (new series) known as "The Building Law" to be numbered 301*a* to read as follows:

Section 301*a*. It shall be unlawful for any person, firm, company or corporation to erect, place or maintain any wooden building or structure of any kind whatsoever in that portion of the City and County of San Francisco described in section 5, part 2 hereof as the Fire Limits."

It is hereby made the duty of the Board of Public Works to enforce the provisions of this section and said Board of Public Works is hereby authorized and directed *directed* to demolish and remove any building or structure affected by this section upon the failure of the owner or owners thereof to comply with the terms of this section; and the cost of said demolition and removal shall constitute a lien on said building or structure and material thereof."

At the time of the erection of the building there was in force in said City and County an ordinance describing a territory designated as "fire limits", but not describing or defining what was meant by the term. The ordinance provided,

"Section 1. The fire limits shall be bounded—" and then follows a description of territory, but nothing to indicate the character of occupations, or businesses which might be carried on, or buildings which might be erected in, said territory.

At the same time there was in force a provision of the Charter of said City and County which gave the Supervisors power,"

"To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained and to prohibit the same within such limits".

80 No other charter provisions or ordinances referring in any way to the subject were or are in existence.

The City and County itself after the erection of the building in question by the plaintiffs, erected and maintained and still maintains similar buildings in the same district or territory.

It levied taxes on the said building and said taxes were paid by the plaintiffs, and still continue to assess said building for taxes.

All of which facts are more fully set forth in the agreed statement of facts in the transcript on appeal on file in this Court, and which transcript is referred to and by reference made a portion of this assignment of errors.

The said District Court of Appeal and the said Superior Court erred in holding and deciding that the said provision of the Charter of the City and County of San Francisco, State of California, and the said Ordinance (Ordinance No. 4170) of the said City and County are, and each of them is not discriminatory and unlawful, and in holding that the said statute and ordinance do not make unlawful the erection, building and maintenance of buildings of canvas, papier-maché or other more inflammable materials than wood, and in holding that said Charter and said Ordinance do not provide for the destruction of buildings and the deprivation of vested rights, without due process of law, and without compensation, in violation of Section 1, Article XIV of the Constitution of the United States, and further in holding that said ordinance is not retroactive and unreasonable, and in holding that said provision of said Charter and said Ordinance gave authority to said defendants to demolish said building without a hearing, and said Supreme Court erred in denying a hearing after the decision of the said District Court of Appeal, and thereby affirming the judgment of said Superior Court.

Wherefore these plaintiffs in error pray that the said judgment may be reversed, and that the plaintiffs may be restored to all things they have lost by reason of the said erroneous judgments.

And, these plaintiffs will ever pray.

JOHN F. RILEY,
Attorney for Plaintiffs in Error.

MICHAEL MAGUIRE,
C. S. MAGUIRE,
Plaintiffs in Error.
By JOHN F. RILEY,
Attorney for Plaintiffs in Error.

80½ [Endorsed:] Original. No. 2809. In the District Court of Appeal, State of California. First Appellate District, Division One. Michael Maguire, et al., Appellants and Plaintiffs, vs. Timothy A. Reardon et al., etc., et al., Respondents and Defendants. Assignment of Errors Accompanying Petition for Allowance of Writ of Error to The United States Supreme Court. J. F. Riley, Attorney for Petitioners, 717 Pacific Building, San Francisco, California. Filed Oct. 14, 1919. J. B. Martin, Clerk. By Walter S. Chisholm.

81 Know all men by these presents:

That we, Annie McGovern and Alysse Maguire, citizens of the United States of America and of the State of California, and residents of the City and County of San Francisco, State of California, are held and firmly bound unto Timothy A. Reardon, Adolf Judell and Daniel G. Fraser, as Commissioners constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan, as Chief Building Inspector, and City and County of San Francisco (a municipal corporation), and each of the, in the full and just sum of Five hundred ($500) Dollars, to be paid to the said above named obligees, their heirs, executors, administrators, successors and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this 11th day of October, 1919.

Whereas, lately, the Superior Court of the State of California, in and for the City and County of San Francisco, in a suit pending in said Court, between Michael Maguire and C. S. Maguire, Plaintiffs, and the above named obligees, defendants, did render judgment against said plaintiffs for costs of suit, and did deny the relief prayed for by said plaintiffs, and said plaintiffs did thereafter appeal from said judgment to the Supreme Court of the State of California, and said Supreme Court did transfer said action to the District Court of Appeal of the State of California, First Appellate District, Division One, and said judgment was, by said District Court of Appeal, affirmed, and thereafter said plaintiffs did apply to the said Supreme Court for a hearing, and said application was denied by the said Supreme Court, and the said plaintiffs have sued out and obtained a writ of error to the said District Court of Appeal, First Appellate District, Division One, in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear in the United States Supreme Court in Washington, D. C. sixty days from the date of said Citation.

Now, the condition of the above obligation is such, that if
82 the said Plaintiffs shall prosecute said Writ of Error to effect, and answer all damages and costs if they fail to make good their plea, the *the* above obligation to be void, else to remain in full force and virtue.

ANNIE McGOVERN.
ALYSSE MAGUIRE.

Signed, sealed and delivered in the presence of
ANDREW G. MAGUIRE.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Annie McGovern and Alysse Maguire whose names are subscribed as the sureties to the above undertaking being severally duly sworn, each for himself, deposes and says: That he is a resident and householder of the City and County of San Francisco, State of California, and is worth the sum specified in the said undertaking specified as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

ANNIE McGOVERN.
ALYSSE MAGUIRE.

Subscribed and sworn to before me this 11th day of October, 1919.
[SEAL.] JOHN L. MURPHY,
Notary Public in and for the City and County of San Francisco, State of California.

October 14th, 1919.

Approved:

WILLIAM H. WAITE,
Presiding Justice, District Court of Appeal, State of California, in and for the First Appellate District, Division One.

82½ [Endorsed:] No. 2809. In the District Court of Appeal, State of California, First Appellate District, Division One. Michael Maguire et al., Plaintiffs and Appellants, vs. Timothy A. Reardon et al., etc., et al., Defendants and Respondents. Undertaking. Filed Oct. 14, 1919. J. B. Martin, Clerk.

83 In the District Court of Appeal, State of California, First Appellate District, Division One.

MICHAEL MAGUIRE and C. S. MAGUIRE, Plaintiffs and Plaintiffs in Error,

vs.

TIMOTHY A. REARDON, ADOLPH JUDELL and DANIEL G. FRASER, as Commissioners Constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan, as Chief Building Inspector; John Doe, James Doe and William Doe, and City and County of San Francisco (a Municipal Corporation), Defendants and Defendants in Error.

Order Allowing Plaintiffs to Take Out and File a Writ of Error.

Now on this 14th day of October, 1919, the plaintiffs Michael Maguire and C. S. Maguire, having filed herein and presented to this

Court their petition praying for the allowance of a Writ of Error intended to be urged by them, the said Michael Maguire and C. S. Maguire, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises, and that an order may be made approving the bond of the plaintiffs, hereby fixed at the sum of Five Hundred (500) Dollars, and staying all further proceedings until the determination of the said Writ of Error by the said Supreme Court of the United States, and having at the same time filed an Assignment of Errors.

Now, on consideration of said petition, and being fully advised in the premises, the Court does hereby allow the said Writ of Error, and approve the said bond.

WILLIAM H. WASTE,
Presiding Justice of the District Court of Appeal,
First Appellate District, Division One.

83½ [Endorsed:] Original. No. 2869. In the District Court of Appeal, State of California, First Appellate District, Division One. Michael Maguire et al., Appellants and Plaintiffs, vs. Timothy A. Reardon et al., etc., et al., Respondents and Defendants. Order Allowing Plaintiffs to Take Out and File a Writ of Error. Filed Oct. 14, 1919. J. R. Martin, Clerk, By Walter S. Chisholm.

84

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the District Court of Appeal of the State of California, First Appellate District, Division One, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of Appeal, before you, between Michael Maguire and C. S. Maguire, Plaintiffs, and Timothy A. Reardon, Adolf Judell and Daniel G. Fraser, as Commissioners constituting the Board of Public Works of the City and County of San Francisco, John P. Horgan as Chief Building Inspector, and City and County of San Francisco (a municipal corporation), Defendants, a manifest error hath happened, to the great damage of the said Michael Maguire and C. S. Maguire, Plaintiffs, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 12th day of December,

1919, to the end that the record and proceedings aforesaid being inspected the Supreme Court of the United States may cause furth r to be done therein to correct that error, what of right, and according to the customs and laws of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this fourteenth day of October, in the year of our Lord One Thousand Nine Hundred and Nineteen.

[Seal of the U. S. District Court, Northern District of California.]

WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

Allowed by
WILLIAM H. WASTE,
Presiding Justice of the District Court of Appeal of the State of California, First Appellate District, Division One.

84½ [Endorsed:] Original. No. 2889. In the District — of Appeal, State of California, First Appellate District, Division One. Michael Maguire et al., Appellants & Plaintiffs, vs. Timothy A. Reardon et al., etc., et al., Respondents & defendants. Writ of Error.

85 In the District Court of Appeal, State of California, First Appellate District, Division One.

MICHAEL MAGUIRE and C. S. MAGUIRE, Plaintiffs and Plaintiffs in Error,

vs.

TIMOTHY A. REARDON, ADOLPH JUDELL and DANIEL G. FRASER, as Commissioners Constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan, as Chief Building Inspector; John Doe, James Doe and William Doe, and City and County of San Francisco (a Municipal Corporation), Defendants and Defendants in Error.

Due and regular service of the Petition for Allowance of Writ of Error to the United States Supreme Court:

Assignment of Errors accompanying petition for allowance of writ of error to United States Supreme Court; Undertaking; Order allowing plaintiffs to take out and file a writ of error; Writ of Error; Citation; is hereby admitted on behalf of all the defendants above named in this action.

GEORGE LULL,
Attorney for Defendants and Respondents Above Named.

Dated October 14th, 1919.

86 In the District Court of Appeal, State of California, First Appellate District, Division One.

MICHAEL MAGUIRE and C. S. MAGUIRE, Plaintiffs and Plaintiffs in Error,

vs.

TIMOTHY A. REARDON, ADOLPH JUDELL and DANIEL G. FRASER, as Commissioners Constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan, as Chief Building Inspector; John Doe, James Doe and William Doe and City and County of San Francisco (a Municipal Corporation), Defendants and Defendants in Error.

Citation.

87 United States of America to Timothy A. Reardon, Adolph Judell and Daniel Fraser, as Commissioners constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan, as Chief Building Inspector, and City and County of San Francisco (a municipal corporation), Defendants in Error:

You are and each of you is hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, District of Columbia, Sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the District Court of Appeal of the State of California, First Appellate District, Division One, wherein Michael Maguire and C. S. Maguire are Plaintiffs in error, and you are Defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. Waste, Presiding Justice, District Court of Appeals, State of California, in and for the First Appellate District, Division One, October 14th, 1919.

[Seal District Court of Appeal, State of California, First Appellate District.]

Attest:

J. B. MARTIN,
Clerk District Court of Appeal, State of California, in and for the First Appellate District.
By WALTER S. CHISHOLM,
Deputy Clerk District Court of Appeal, State of California, in and for the First Appellate District.

Oct. 14th, 1919.

87½ [Endorsed:] #2809. In the District Court of Appeal, State of California, First Appellate District, Division One. Michael Maguire et al., Appellants & Plaintiffs, v. Timothy A. Reardon et al., etc., et al., Respondents and Defendants. Citation with Proof of Service of Papers, etc. Filed Oct. 14, 1919. J. B. Martin, Clerk, By Walter S. Chisholm, Citation.

88 UNITED STATES OF AMERICA,
District Court of Appeal of the State of California in and for the First Appellate District, Division One, ss:

Return.

In obedience to the commands of the written writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said District Court of Appeal of the State of California, First Appellate District, in the City and County of San Francisco, this 8th day of November 1919.

[Seal District Court of Appeal, State of California, First Appellate District.]

J. B. MARTIN,
Clerk District Court of Appeal of the State of California in and for the First Appellate District,
By WALTER S. CHISHOLM,
Deputy.

Costs of Suit.

Defendant's costs	None

Costs of transcript, paid by Plaintiff:

Comparing record	$2.59
Filings (4) @ 25¢	1.00
Certificates (3) @ $1	3.00
Express charges	.51
Total	$7.10

89 DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE, *ss:*

Certificate of Lodgment.

I, J. B. Martin, Clerk of above entitled court, do hereby certify that there was lodged with me as such clerk on the 14th day of October, 1919, in the matter of Michael Maguire et al. vs. Timothy A.

Reardon et al., constituting the Board of Public Works of the City and County of San Francisco et al.:

1. The original bond of which a copy is herein set forth.

2. Two copies of writ of error, as herein set forth, one for the defendants and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in the City and County of San Francisco, this 8th day of November, 1919.

[Seal District Court of Appeal, State of California. First Appellate District.]

J. B. MARTIN,
Clerk District Court of Appeal of the State of California in and for the First Appellate District,
By WALTER S. CHISHOLM,
Deputy.

90 In the District Court of Appeal, State of California, First Appellate District, Division One.

MICHAEL MAGUIRE and CHARLES S. MAGUIRE, Plaintiffs and Plaintiffs in Error,

vs.

TIMOTHY A. REARDON, ADOLPH JUDELL and DANIEL G. FRASER, as Commissioners Constituting the Board of Public Works of the City and County of San Francisco; John P. Horgan, as Chief Building Inspector, and City and County of San Francisco (a Municipal Corporation), Defendants and Defendants in Error.

Stipulation as to Record.

To the Clerk of the Above Entitled Court:

It is hereby stipulated and agreed, by and between the parties to the above entitled action and matter, that the following documents shall go into and constitute the record in the above entitled matter in the appeal to the Supreme Court of the United States:

Complaint; Amended Answer to Complaint; Demurrer to Amended Answer; Minute Order Overruling Demurrer to Amended Answer; Minute Order Dismissing as to Fictitious Defendants; Stipulation for Rendition of Judgment on Agreed Statement of Facts and Agreed Statement of Facts; Findings of Facts and Conclusions of Law, omitting therefrom that portion thereof reciting the Agreed Statement of Facts, and inserting in place thereof, "Here followed Agreed Statement of Facts as set forth hereinbefore"; Judg-
91 ment; Clerk's Certificate to Judgment Roll; Notice of Appeal; Petition for Writ of Error; Assignment of Errors;

Order Allowing Writ of Error; Writ of Error; Citation to Writ of Error and Proof of Service; Appeal Bond and Approval.

It is further stipulated and agreed by and between the parties hereto, that the plaintiffs did appeal from the judgment rendered by the Superior Court of the City and County of San Francisco, State of California, and that said Supreme Court did assign the said case to the District Court of Appeal, First Appellate District, Division One, for hearing; that the appeal was heard by the said District Court of Appeal, and the judgment appealed from was affirmed; that thereafter plaintiffs filed a petition for a re-hearing by said District Court of Appeal, and the re-hearing asked for was denied; that thereafter plaintiffs filed a petition for a hearing before the Supreme Court of the State of California, which said petition was, by said Supreme Court, denied; that the remittitur in said case was filed on the 15th day of August, 1919, in the office of the County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of said Superior Court of the City and County of San Francisco, State of California; and that this stipulation be included in and made a part of said record.

GEORGE LULL,
MAURICE T. DOOLING, JR.,
Attorneys for Defendants and Defendants in Error.
JOHN F. RILEY,
Attorney for Plaintiffs and Plaintiffs in Error.

San Francisco, November 7th, 1919.

91½ [Endorsed:] Original. No. —. In the District Court of Appeal of the State of California in and for the First Appel-ate District. Michael Maguire et al., Plaintiffs & Plaintiffs in Error, vs. Timothy A. Reardon et al., Defendants & Defendants in Error. Stipulation as to Record. Original. Filed Nov. 7, 1919, J. B. Martin, Clerk, By Walter S. Chisholm. George Lull, City Attorney, Attorney for Defendants, San Francisco, Cal.

92 DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION ONE, *ss:*

I, J. B. Martin, Clerk of above entitled court, do hereby certify that the foregoing papers, numbered from 1 to 91 inclusive, are a true, full and complete transcript of the record and proceedings in the case of Michael Maguire et al., Plaintiffs, vs. Timothy A. Reardon et al., etc., Board of Public Works, City and County of San Francisco, Defendants, as provided for by stipulation of the parties included herein, to-wit:

Complaint.
Amended Answer to Complaint.
Demurrer to Amended Answer.
Minute Order Overruling Demurrer to Amended Answer.
Minute Order Dismissing as to Fictitious Defendants.

Stipulation for Rendition of Judgment on Agreed Statement of Facts and Agreed Statement of Facts.
Findings of Facts and Conclusions of Law.
Judgment.
Clerk's Certificate to Judgment Roll.
Notice of Appeal.
Petition for Writ of Error.
Assignment of Errors.
Order Allowing Writ of Error.
Writ of Error.
Citation to writ of error and proof of service.
Appeal Bond and Approval.

And also the following:

Opinion of the District Court of Appeal of the State of California, in and For the First Appellate District, Division One.
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[Seal District Court of Appeal, State of California, First Appellate District.]

J. B. MARTIN,
Clerk District Court of Appeal of the State of California in and for the First Appellate District.
By WALTER S. CHISHOLM,
Deputy.

November 8th, 1919.

Endorsed on cover: File No. 27,362. California First Appellate District, Division One. District Court of Appeal. Term No. 607. Michael Maguire and C. S. Maguire, Plaintiffs in Error, vs. Timothy A. Reardon et al., as Commissioners Constituting The Board of Public Works of the City and County of San Francisco, et al. Filed November 19th, 1919. File No. 27,362.

JAN 11 [redacted]

JAMES D. MAHER,
CLERK.

[redacted] Supreme Court
of the
United States

October Term, 1919

No. [redacted]202

[redacted] Kearney and C. S. Kearney,
Plaintiffs in Error,

vs.

Patrick A. Maguire et al., as Commissioners Constituting the Board of Public Works of the City and County of San Francisco et al.,
Defendants in Error.

In Error to the District Court of Appeal of the State of California for and for the First Appellate District, Division One.

[redacted] FOR PLAINTIFFS IN ERROR.

J. F. [redacted],
Attorney for Plaintiffs in Error.

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(27,362)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No. 607

MICHAEL MAGUIRE and C. S. MAGUIRE,
Plaintiffs in Error,

vs.

TIMOTHY A. REARDON et al., as Commissioners, Constituting the Board of Public Works of the City and County of San Francisco et al.,
Defendants in Error.

In Error to the District Court of Appeal of the State of California in and for the First Appellate District, Division One.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

This is a writ of error to the District Court of Appeal, First Appellate District, Division One, State of California.

The case went to said District Court of Appeal upon an appeal from the judgment of the Superior Court of the City and County of San Francisco, in which latter Court the matter was submitted on an agreed statement of facts, in substance as follows:

In May, 1906, a wooden building costing $12,000 was erected within the limits described in the ordinance hereinafter referred to.

At the time of the erection of the building there were in existence, an ordinance of the City and County of San Francisco and a charter provision, as follows:

Charter Provision.

"Section 1. Subject to the provisions, limitations and restrictions in this charter contained, the Board of Supervisors shall have power * * *

5. To fix the limits within which wooden buildings or structures shall not be erected, placed, or maintained, and to prohibit the same within such limits. Such limits when once established shall not be changed except by extension."

Ordinance No. 1198.

"Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. The fire limits shall be bounded by a line commencing (describing a district within which is the building in question).

Section 2. Every person, company or corporation violating the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred (500) dollars, or by imprisonment not exceeding six (6) months, or by both such fine and imprisonment."

By and with the consent of the defendants in error, and under the written permit and supervision of the Board of Public Works of the said city and county, an oven, costing $700 was installed in said building and is still a part of said building.

The building consists of nine stores which were and are rented to tenants, duly licensed by said city and county to conduct businesses in said stores.

The plaintiffs in error paid taxes on said building to the said city and county, from the time of its erection to the present time, and said building is still assessed and taxed by said city and county.

The said City and County of San Francisco has since the erection of said building above described, erected and maintained and used, and is now maintaining and using in the same district or fire limits (referred to above, and in the alleged ordinance in the amended answer set forth) in and within which said building belonging to plaintiffs is situated, wooden buildings, including two firehouses, two wooden buildings used as school rooms, and one police station, in which many human beings are housed and some kept and detained.

On December 22, 1909, three and one-half years after the construction of the building in question, Ordinance 1008 (new series), was enacted, as follows:

"Regulating the Construction, Erection, Enlargement, Raising, Alteration, Repair, Removal, Maintenance, Use, and Height of Buildings; Regulating Character and Use of Mate-

rials in and for Buildings; Establishing Fire Limits, and Repealing all Ordinances in Conflict with this Ordinance."

Section 3 of said Ordinance No. 1008 (new series) has never been repealed. Said section 3 of said Ordinance No. 1008 (new series) at all times read and provided and now reads and provides as follows:

"Section 3. That portion of the City and County of San Francisco within the boundary lines in this section hereinafter set forth shall be known as the fire limits within which it shall be unlawful to erect or construct frame or wooden buildings, or to alter, enlarge, repair, add to or build upon any building or buildings except as in this ordinance otherwise provided, viz.:" (describing territory)

The said building was within the territory described in said ordinance.

On May 8, 1917, an Ordinance No. 4170, was enacted as follows:

"Ordinance No. 4170 (new series).

Amending Ordinance No. 1008 (new series) known as 'The Building Law' approved December 22, 1909, by adding thereto a new section to be numbered '301a'.

Be it ordained by the People of the City and County of San Francisco as follows:

'Section 1. A new section is hereby added to Ordinance No. 1008 (new series) known as "The Building Law" to be numbered 301a to read as follows:

'Section 301a. It shall be unlawful for any person, firm, company or corporation to erect, place or maintain any wooden building or struc-

ture of any kind whatsoever in that portion of the City and County of San Francisco described in section 3, part 2 hereof as the Fire Limits.'

It is hereby made the duty of the Board of Public Works to enforce the provisions of this section and said Board of Public Works is hereby authorized and directed to demolish and remove any building or structure affected by this section upon the failure of the owner or owners thereof to comply with the terms of this section; and the cost of said demolition and removal shall constitute a first lien on said building or structure and the material thereof.

Ordinance No. 1139 (new series) approved April 12, 1910, is hereby repealed."

Assuming to act under the authority given by said last mentioned ordinance (4170, new series), the Board of Public Works in October, 1917, more than eleven years after the erection of the building, without a hearing being given the plaintiffs in error, served notices on the plaintiffs in error and their tenants to the effect that under Ordinance No. 4170 (new series), approved May 8, 1917, it would, upon failure of the owners of said building to demolish and remove said building within five days after service of the notice, demolish and remove the same. (Trans. fols. 48-50, pp. 23 and 24).

An action was commenced by plaintiffs in error to restrain defendants from so demolishing and removing said building; judgment went for defendants; from that judgment an appeal was taken, and the judgment being affirmed by the District Court of Appeal, and an application for a rehearing denied, application to the Supreme Court for a

hearing was made and denied; and thereupon said writ of error was sued out.

The question is, Can the defendants, under said circumstances, without a hearing, without a determination by a Court of competent jurisdiction that the building is a public nuisance, demolish and remove the building?

Specifications of Errors.

The said State Courts erred in holding and deciding:

(1) That the said charter provision and Ordinance No. 4170 are and each of them is not discriminatory and unlawful in prohibiting the erection and maintenance of wooden buildings, and in not prohibiting the erection and maintenance of buildings of canvas, beaver board, papier-mache or other materials equally as or more inflammable than wood, and in holding and deciding in effect, that the application and administering of said charter provision and ordinance by said defendants, by themselves erecting and maintaining in the same district buildings of like construction with that sought to be destroyed, are not discriminatory and are not a denial of equal justice within the prohibition of the constitution of the United States;

(2) That said charter provision and said ordinance do not provide for the destruction of buildings and the deprivation of vested rights, without due process of law, and without compensation, in

violation of Section 1, Article XIV of the Constitution of the United States;

(3) That said Ordinance No. 4170 is not retroactive and unreasonable;

(4) That said charter provision and Ordinance No. 4170 authorized defendants to demolish and remove said building without a hearing; and in holding and deciding in effect, that the application and administering of said charter provision and ordinace by said defendants, by themselves erecting and maintaining in the same district, buildings of like construction with that sought to be destroyed, are not discriminatory, and are not a denial of equal justice within the prohibition of the constitution;

(5) That said Supreme Court of the State of California, erred in denying a hearing after the decision of the said District Court of Appeal, and thereby affirming the judgment of said Superior Court;

(6) That said charter provision and Ordinance No. 1198, did forbid and make unlawful the erection and maintenance of said building.

I.

AT TIME OF ERECTION OF BUILDING THERE WAS NO RESTRICTION ON MATERIAL TO BE USED.

The only ordinance in effect at the time of the erection of the building in any way affecting the building was Ordinance No. 1198.

Said ordinance is entitled "Defining the Fire Limits of the City and County of San Francisco," describes certain territory, and in section 2 makes it a misdemeanor to violate the provisions of the ordinance.

It will be noted that there is no provision in the ordinance stating for what purpose the limits are established—whether as a district in which powder factories may not be erected, or manufacturing plants conducted, or steam engines installed, or canvas buildings erected. In fact, there is no inhibition of any kind whatever in said ordinance.

THERE IS NO PROVISION OF SAID ORDINANCE NO. 1198 WHICH CAN BE VIOLATED.

Defendants contended, however, that this ordinance should be read in connection with the above referred to provision of the charter, which reads as follows:

> "Section 1. Subject to the provisions, limitations and restrictions in this charter contained, the Board of Supervisors shall have power:
>
> "(5) To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained, *and to prohibit the same within such limits.* Such limits when once established shall not be changed except by extension." (Italics ours.)

It is not contended that the Board of Supervisors ever exercised the power given them by said charter provision, to prohibit the erection or maintenance of wooden buildings within said limits until December 22, 1909, three and one-half years after

the construction of the building in question, when Ordinance No. 1008 (new series) was enacted. This ordinance *did in express terms* make it unlawful to erect frame or wooden buildings within the restricted district (Trans. p. 27, fol. 57).

The particular ordinance under which respondents claim to act, however, is Ordinance No. 4170 (new series), approved May 8, 1917, about five months before the threat to demolish our building which had been erected eleven years before the ordinance was passed, upon which said city and county had been receiving taxes for eleven years, and from the tenants in which it had been receiving license taxes for the same length of time, was made and served.

These questions are thus squarely presented:

(1) Does an ordinance merely stating how the "fire limits" shall be bounded, *forbid* the erection of buildings?

(2) Does a charter provision giving to a Board of Supervisors the power to fix limits within which wooden buildings shall not be constructed or maintained, by itself, without action by the Board of Supervisors, forbid the erection or maintenance of such buildings?

(3) Can a city, by an ordinance passed years after the erection of a building, which building it has taxed and from which it has received income for years, the right to maintain which it has recognized for years, authorize the demolition and re-

moval of said building, and especially where, as admitted here, the city has itself continuously, since the erection of the building in question here, erected and maintained, and is still maintaining and using buildings of identical construction within the very same district?

We would call your honors' attention to the fact that the conclusion of the Superior Court is that the building was erected and constructed, *"in violation of law, to wit: in violation of the provisions of said Ordinance No. 1198 and subdivision 5, section 1, chapter II of article II of the charter of the City and County of San Francisco"*.

Counsel for defendants contended in the lower Court that the case of Bancroft v. Goldberg Bowen & Co., 16 Cal. App. Dec. 37, and (on rehearing) in 166 Calif. 416, authorized the conclusion that said ordinance and charter provision justify the action of the Board of Public Works.

That case is not authority for the reason that the *facts* in that case are very different from those in the case at bar.

In the Bancroft case, the *record* showed the existence *at the time of the erection* of the building, of an ordinance *forbidding the erection of such building*.

While in this case, no such ordinance was in existence at the time of the erection of the building, the first ordinance forbidding the erection of wooden (frame) buildings having been enacted in Decem-

ber, 1909, over three years after the erection of the building.

We would state further that the opinion of the District Court of Appeal in the Bancroft case, is not authority, a rehearing having been granted and an opinion filed by the Supreme Court of California.

The question in this case is, Does the charter provision or the ordinance in force at the time of the erection of the building (No. 1198), forbid the erection? Or do they, taken together, so forbid it?

The charter says (Trans. fol. 51, p. 25), that the Board of Supervisors shall have power

> "5. To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained, *and to prohibit the same within such limits.*"

If this is not a delegation to or conferring upon the Board of Supervisors, the power to prohibit the erection of buildings within such limits, it is impossible to say what it is. The language is plain, and by no construction, even a strained one, can it be held that the freeholders intended to do other than leave to the Board of Supervisors all action in this connection.

That this charter provision is not self executing, will undoubtedly be admitted here, as it was on argument in the State Court.

Had the framers of the charter intended to prohibit the erection of wooden buildings, they would

not have declared that the supervisors have that power.

How can it be said that an instrument, expressly giving to a legislative body the power to do certain things, has done those things itself, in the very article giving that power to the legislative body?

No case has been cited making any such holding, no argument sustaining the conclusion made, no reasons for the conclusion are given.

The decisions as to *constitutional provisions* are of course applicable to the charter provisions.

In French v. Teschemeker, 24 Cal. 518; Art. 14, Sec. 36, of the constitution, reading as follows:

> *"The stockholder of a corporation shall be individually and personally liable for his portion of all its debts and liabilities"*

was under consideration. That provision is certainly far stronger than the one under consideration here, but the Supreme Court of California held that it was *not* self-executing, and that legislative action was necessary to make it effective, and that without such legislative action, it was inoperative.

In Ex parte Wall, 48 Cal. 379 (318), a provision of the constitution with regard to the establishment of county and town governments was under consideration. Art. XI, Sec. 4, of the constitution provided:

> "The Legislature shall establish a system of county and town governments which shall be as nearly uniform as practicable throughout the State."

Sec. 37 of the same article provided:

> "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, etc."

The Court said of these sections:

> "But the constitution is not self executing; the town governments must be created by statute. And it will be observed, the constitution commands the legislature to establish a system of town governments."

In the case at bar the charter provision in question provides:

> "Subject to the provisions, limitations and restrictions in this charter contained, the *Board of Supervisors shall have power:—5.* To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained and *to prohibit the same within such limitations.*"

Prior to the erection of our building, the power given to the supervisors by said charter provision was expressed to the extent only of designating how, what they termed the "fire limits" should be bounded.

But in so far as exercising the power to prohibit the erection of wooden buildings within certain limits it was not exercised until years after the erection of our building.

In Spinney v. Griffith, 98 Cal. 149, Sec. 15 of Article XX, of the Constitution, providing that mechanics etc. shall have a lien upon property upon which they bestow labor, providing "the legislature

shall provide by law for the speedy and efficient enforcement of such liens", was under consideration, the Court held that:

> "This declaration of a right, like many others in our constitution, is inoperative except as supplemented by legislative action.
>
> So far as substantial benefits are concerned the naked right without the interposition of the legislature is like the earth before the creation 'without form and void', or to put it in the usual form, the constitution in this respect is not self executing."

This language unquestionably applies to the article or provision of the charter in question here.

In McHenry v. Downer, 116 Cal. 20 (24), Section 1 of Article XIII of the constitution, providing for taxation in the following language,

> "All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law",

was under consideration; the Court said:

> "It will appear at a glance that the foregoing constitutional provision is not, *and does not pretend to be self-executing.*"

This is also apparent in the charter section in question, because that section provides that the *Board of Supervisors* shall have the power to do certain things, namely, shall *prohibit the erection of certain wooden buildings.*

In Boca etc. R. R. v. Sierra Valley R. R., 2 Cal. App. 546 (558-9), the provision of the constitution

that "every railroad shall have the right with its road to intersect, connect with or cross any other railroad", was under consideration (a provision much stronger than the one in question here), and it was held *not* self-executing so as to allow the railroad, regardless of its charter powers and of the statute providing for condemnation to exercise the right to cross.

In Older v. Superior Court, 157 Cal. 770; Sec. 9, Art. 1, of the constitution, providing for trial of libel cases

> "in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause"

was in question. It was contended in that case that it was intended by the makers of the constitution to take entirely from the legislature the power of providing the grounds upon which an indictment or information for criminal libel arising out of the publication of a newspaper might be transferred for trial from the county in which the prosecution was instituted.

The Court says:

> "The constitutional provision which we are considering either bestows a right which is to be regulated and given definite operation by the statute, or it takes the place of statutory enactment and becomes itself a statute which may not be repealed by the legislature. Only upon the latter theory can it be upheld as self executing. This doctrine is well expressed by Judge

Cooley as follows: 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty imposed may be enforced; and it is not self-executing where it merely indicates principles without laying down rules by means of which those principles may be given the force of law.' The Supreme Court of Illinois has said:

'Where the constitution requires the performance of an act, but provides neither officers, the means or the mode in which the act shall be performed, in such a case there is no other means of carrying such provision into effect but by appropriate legislation. In such case the constitution does not execute such provisions.' Applying the rule above expressed, it becomes clear that the section of the constitution which we are considering is not self-executing. If the members of the constitutional convention had intended to take the subject of change of venue in these cases entirely away from the legislature, it seems most highly probable that they would have provided in the constitution all of the machinery for transferring the case."

So, in the case at bar, if the charter makers had intended that section of the charter to be self-executing, they would never have charged the Board of Supervisors with the duty therein imposed.

The Board of Supervisors did not, as we have already shown, make any enactment prohibiting the erection of such buildings, until years after the erection of our building; and they did then, recognizing their obligation to make such prohibition under the terms of the charter, pass an ordinance

which did in terms prohibit the erection of such buildings.

If there be anything in the interpretation of the charter by the Supervisors themselves, which would affect this Court, this should certainly do so. It shows that the Supervisors and their advisers *did* consider it necessary to pass such ordinance, and it was a recognition by them of the fact that there was no prohibition against the erection of buildings such as that in question.

DOES THE ORDINANCE PROHIBIT THE ERECTION OF THE BUILDING?

The ordinance in force at the time of the erection of the building (Ordinance 1198) was entitled,

> "Defining the Fire Limits of the City and County of San Francisco,"

and reads as follows:

> "Section 1. The fire limits shall be bounded by a line (and proceeds to describe a territory, within which the building in question was erected).
>
> Section 2. Every person, company or corporation violating the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding five hundred (500) dollars, or by imprisonment not exceeding six (6) months, or by both such fine and imprisonment."

Manifestly there is no *prohibition in words* in said ordinance, and the question arises will courts

import a prohibition into an ordinance, penal in its nature?

It is well established that fire limits ordinances, being penal in their nature, must be strictly construed.

Dillon, in his work on Municipal Corporations (5th Ed.), Vol. II, p. 1106, says:

> "But the power to establish fire limits and to regulate the manner of constructing buildings therein is in derogation of common right, and must be *strictly construed* in favor of the owners of buildings within its limits."

In City Council of Montgomery v. Louisville & N. R. Co., 84 Ala., 127 (4 South. Rep. 626), the Court held that such an ordinance, being penal in its nature, must be strictly construed against the municipal authorities.

Is it possible to construe the words, "the fire limits shall be bounded", to mean "No wooden building of any kind whatever shall be erected within the following territory"?

Can a citizen be deprived of his liberty and of his property under an ordinance such as that?

When arrested, what charge could be made against him? What prohibition did he disregard, what injunction did he disobey?

As was said by the Supreme Court of Oregon, in Morton v. Wessinger, et al., 113 Pac. Rep. 7, where a San Francisco ordinance was under consideration,

> "All statutes which encroach on the personal or property rights of the individual, are to be construed strictly, and in the absence of express words or necessary intendment or implication, it will be presumed that a statute is not intended to interfere with or prejudice a private right or title. 26 A. & E. Ency., 661."

The only ordinance in force concerning fire limits at the time of the erection of the building was No. 1198.

That ordinance read, "The fire limits shall be bounded", etc.

Not one word to indicate what is meant by fire limits is contained in the ordinance. There might be a dozen "fire limits", each with a different limitation. In one no wooden building over one story in height could be erected; in another, no canvas buildings could be erected; in another, no wooden building used for other than dwelling purposes could be erected; in another no brick or concrete or steel building if it had a wooden roof; and so on indefinitely.

There is absolutely nothing in the ordinance which justifies the conclusion that it was intended to prohibit the erection of a one-story wooden building.

It would be a strained construction which would interpret the words "The fire limits shall be bounded", to mean "No wooden building of any kind whatever shall be erected within the following territory".

Possibly the supervisors had *intended* to put into the ordinance some words which would make the erection of certain kinds of buildings within the described territory unlawful, but if they did so intend, the writer failed to insert them.

That they recognized this fact is shown by Ordinance 1008 (new series) (enacted December 22, 1909), in which such language was used.

Even *without* invoking the rule of strict construction, we submit the ordinance cannot be construed as forbidding the erection of the building in question.

With the strict construction which must be applied to the ordinance, how can it be said anything is prohibited?

It is a *penal* ordinance. The violation of it (if there had been any provision to violate) would have been a misdemeanor.

We submit that an ordinance of this character, attempted to be used to deprive a man of his liberty and his property—to ruin him, must contain prohibitive words; otherwise, it *prohibits* nothing.

DO THE CHARTER PROVISION AND THE ORDINANCE (1198) TOGETHER FORBID THE ERECTION OF THE BUILDING?

The charter provision, under which the lower Court found the erection of the building unlawful, gives to the Board of Supervisors the power,

> "5. To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained, *and to prohibit the same within such limits.*"

No contention is made that the supervisors ever (prior to the erection of the building) passed any ordinance which, in words, fixed limits within which wooden buildings or structures shall not be erected or maintained, and as we have shown there is not a word in Ordinance No. 1198 about wooden or any other buildings, nor was there any ordinance "*prohibiting the same within such limits*", when the building was constructed.

It will not, we think, be contended that the charter provision is self-executing, and it is apparent that the power to *prohibit* such building had not been exercised.

It will not be sufficient to say that the failure to do so was an oversight; to deprive one of his property, the ordinance must contain clear and distinct provisions to that effect.

As we have shown, and as is apparent from a reading of the charter provision, the charter makers delegated to the Supervisors the task of forbidding or prohibiting the erection of buildings.

> "To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained, *and to prohibit the same within such limits.*"

As well might it be contended that the charter provision had fixed such limits, as to contend that it had prohibited the erection of our building.

But the Supervisors did not, until over three years after the erection of the building pass any ordinance making unlawful the erection of such buildings.

Counsel for defendants contended that the use of the words *"fire limits"* in the ordinance was sufficient, without any express prohibition.

But, leaving aside for the moment the rule that such ordinances must be strictly construed, "fire limits" is an expression of exceedingly varied meanings.

For instance in Webster's International Dictionary appears this definition:

> "The limits fixed by a town or city government within which no framed structures may be built *and no building may have a shingled roof.*"

It is a matter of general knowledge that in many towns and cities, wooden buildings within certain limits are required to have roofs other than shingled ones; other cities have limits designated as fire limits, in which no *movable* buildings, nor any *tent* may be placed. It is also a matter of general knowledge that certain limits are fixed in many places within which certain occupations and businesses which increase the fire hazard may not be conducted. In fact any district in which buildings, whether all or part wood, canvas or of any other inflammable materials and businesses or occupations which add to the danger of fires are prohibited, could be called "fire limits".

In certain portions of the so-called fire limits of San Francisco, are frame buildings with a veneering of brick. A special district might be established in which such buildings might not be allowed. Would not that district be a "fire limits" too?

So, as shown by the above quotation, a district in which no building could have a wooden or shingle roof (no matter what the construction of the rest of the building might be) could be designated as "fire limits".

Who is to say what the Supervisors intended to forbid in the district established by said ordinance? Did they intend to allow the placing of tents and movable buildings? Did they intend to allow brick buildings with shingle roofs? Did they intend to limit the inhibition to wooden buildings?

How can any one say which of the many meanings of "fire limits" was intended by the Supervisors?

The experience of San Francisco has shown that there is no building material which is fire proof. That the matter of destructibility is a matter of degree, only.

Therefore, in establishing fire limits, it is the almost universal custom to describe what particular materials may be used in the particular district as was done in San Francisco by the Supervisors after the completion of our building.

We submit that under the well established rule, namely, that all statutes which encroach upon the

personal or property rights of the individual are to be construed strictly, and in the absence of express words or necessary intendment, it will always be presumed that it was not intended by the statute to interfere with or prejudice a private right, it must be presumed that the ordinance was not intended to interfere with our rights.

SAID ORDINANCES ARE DISCRIMINATORY.

Assuming, without conceding, that the ordinance in force at the time of the erection of the building, did prohibit the erection of wooden buildings, yet it, like Ordinance 1008 (new series), which was enacted years after the erection of the building, is plainly discriminatory.

Tugman v. Chicago, 78 Ill. 405;
Ex parte Bohen, 115 Cal. 372;
Plymouth v. Schulties, 135 Ind. 339; 35 N. E. 12-14;
Richmond v. Dudley, 128 Ind. 112; 28 N. E. 312; 13 L. R. A. 587;
State v. Deffes, 45 La. Ann. 658; 12 So. 841;
State v. Du Barry, 44 La. Ann. 1117; 11 So. 718;
State v. Tenant (110 N. C. 609), ~~14 S. C. 387~~; 15 L. R. A. 425;
Lake View v. Tait, 22 N. E. 791-793;
Hudson v. Thorne, 7 Paige 261;
Yick Wo v. Hopkins, 113 U. S. 356.

Defendants cite on this subject a number of cases holding valid ordinances forbidding the erection of wooden buildings within certain limits, but in not one of them, so far as we have discovered, was the point presented here, raised or discussed.

And many of the ordinances do refer to "other combustibles", as for instance forbidding the placing of a wooden *or other combustible* roof on a building.

Wooden cannot, by any stretch of the imagination, be construed to mean *canvas* or *paper* or beaver board (which has been used and is being used in the construction of buildings). And, so far as the ordinance in question is concerned, one could erect tents or paper buildings any place in the City and County of San Francisco.

The Board of Supervisors cannot lawfully discriminate between the owner of a *wooden* building and the owner of a canvas or other combustible building.

The ordinance is further discriminatory in this: The City and County of San Francisco is permitted under that ordinance to erect and maintain within the fire limits wooden buildings. Evidently the ordinance has been construed by the defendants to *not* include *municipal corporations;* otherwise, of course, the defendants in this action would not have erected and maintained the school houses, fire houses and police station, all wooden buildings, and all erected since the erection of the building in suit, and con-

tinuously used and maintained to this time, and all for purposes more dangerous to public safety than those to which plaintiffs' building is put.

It cannot be maintained that it is not discrimination for a city to favor *itself* as against its residents and property holders, not only in the matter of the erection and maintenance of wooden buildings, but also in maintaining, without taxation, its wooden buildings, while it taxes the wooden buildings of others, while claiming them to be unlawfully maintained, at the same time taking revenue by way of license taxes from the occupants of the building for the conducting of legitimate businesses, which businesses it now seeks to destroy.

We submit the ordinance is plainly discriminatory and void.

This Court in Yick Wo v. Hopkins, 118 U. S. 356 (373) (30 L. Ed. 220), speaking on this subject, said:

> "In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus

> representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The mode of carrying out or administering an ordinance is as much to be considered in passing upon its discriminatory character as is its language. If it is being applied and administered by public authority with an unequal hand and so as to make unjust discrimination between us and the municipal corporation, the denial of equal justice, is, as was said by this Court in the Yick Wo case, within the prohibition of the constitution (118 U. S. 356, 373).

The question is, "Does the action of the city in administering the alleged law do so (to use the language of this Court in the Yick Wo case), "with an evil eye, and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights?"

If it does, the ordinance is unconstitutional, there is a denial of equal justice.

Plaintiffs and the city are in the same positions—owning and using buildings of wood, erected within the same district. The city retains and continues the use of its buildings—demolishes and destroys ours.

Let us suppose this case, one which, in these days of municipal ownership, may well arise:

The city conducting a street railway system, enacts an ordinance forbidding the erection of a wooden or corrugated iron building within certain limits.

It proceeds to erect and maintain and use extensive buildings cheaply constructed of wood or corrugated iron as car barns and repair shops within the proscribed district.

A is also conducting a railway, also needs large buildings for similar purposes but must build very costly structures of other materials if he wishes to house his cars or establish his repair shops within the district.

Or, the city is conducting a garbage destroying plant—or a laundry or a printing establishment, and prohibits others from using the same kind of buildings it uses, or from conducting similar enterprises within the same limits.

Would not such application of the law be within the prohibition of the constitution?

It is admitted that the city is doing the very thing which it attempts to prevent us from doing, is applying and administering with an unequal hand

the ordinances, is denying us that which it takes itself.

The principle laid down in the Yick Wo case has been reaffirmed time and again.

It is not enough that the ordinance or statute *on its face* is a valid enactment. Its *application* will always be considered in determining its validity.

It is not from its *proclaimed purpose,* that its repugnancy to the constitution will be determined, but from the natural effect when put in operation, and *as put in operation or applied.*

In Dobbins v. Los Angeles, 195 U. S. 223 (49 L. Ed. 169), this Court said:

> "but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance."
>
> "This court in the case of Yick Wo v. Hopkins, 118 U. S. 356 (6 Sup. Ct. 1064, 30 L. Ed. 220), held that although an ordinance might be lawful on its face and apparently fair in its terms, yet, if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts."

There is much resemblance between the Dobbins case and the case at bar.

An ordinance of the City of Los Angeles made unlawful the erection and maintenance of gas works

outside of a certain described district. While this ordinance was in force plaintiff contracted with a gas company for the erection of gas works on land to be purchased by her, bought lands within the privileged district, secured a permit for the erection of the works, and the foundations were constructed at a cost of over $2500.

After the foundations had been nearly completed, the city council passed a second ordinance, amending the first and limiting the territory within which the erection of gas works was permitted, so as to place the land so purchased outside that territory.

The work was prosecuted however, until employees of the persons erecting the works were arrested for violating the second ordinance.

A short time after, the ordinance was again amended with respect to the description of the territory, and arrests of employees of the erectors for violating the third ordinance were made.

This Court quoted from Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (46 L. Ed. 679) (among other matters), the following:

> "The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but, if by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." (Citing cases.)

In Reagan v. Farmers Loan & Trust Co., 154 U. S. 390, (38 L. Ed. 1014), this Court said:

> "Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and, when they do so, the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

This Court said in the Yick Wo case:

> "the equal protection of the laws is a pledge of the protection of equal laws'.

The city cannot make (or apply) a law to its benefit as against the interests or rights of its inhabitants.

This Court again in Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (46 L. Ed. 679 (689)), said:

> "It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national constitution. No rule can be formulated that will cover every case. But *upon this general question we have said that the guarantee of the equal protection of the laws means 'that no person or class of persons shall*

be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' Missouri v. Lewis, 101 U. S. 22, 31, sub nom. Bowman v. Lewis, 25 L. Ed. 989, 992. We have also said: 'The 14th Amendment in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction—the equal protection of the laws" undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, *but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights;* that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; *that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition.*" * * * (Citing cases.) (Italics ours.)

In Hayes v. Missouri, 120 U. S. 68, (30 L. Ed. 578), this Court said, speaking of the 14th Amendment:

"It merely requires that all persons subjected to such legislation *shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.*" (Italics ours.)

In Standard Computing Scale Co., Ltd. v. Farrell, etc., 242 Fed. Rep. (D. C., S. D., N. Y.) 87 (90) the Court said:

> "Unconstitutionality is usually tested by an examination of the language of a statute, but sometimes (even if that language be unexceptional) *the action or practical application thereof may give rise to an unconstitutionality not inherent in the law, but arising from the unjust and extravagant application thereof, by the human beings charged with its reasonable enforcement.*" (Italics ours.)

In South & N. A. R. Co. v. R. R. Commission of Alabama et al., 171 Fed. Rep. (C. C., M. D. Ala., N. D.) 225 (230), a case where counsel for respondent contended that no inquiry was permissible as to whether carriers other than those contesting the rates were favored by changes made in the rates and classifications, which rates and classifications were still enforced against complainants, the Court said, after quoting from 164 U. S. 578:

> "And in numerous cases since then the Supreme Court has held that, the conditions being substantially the same, favor to one person, and disfavor to another, and the imposition of unequal burdens upon them, effected by the terms of a statute *or the manner in which it is enforced*, is a denial of the equal protection clause. * * * How else may the suitor show the administration of the law 'with an evil eye and an unequal hand' than by showing the instances in which the authorities have executed the law concerning different persons, the relative situation of those different persons, and the ordinary and natural effect of the administration of the law upon their rights, and whether, when as

> thus administered, invidious burdens are placed upon one person, and favors conferred upon others, who, relatively speaking, are in the same class The administration 'with an evil eye', which the constitution condemns, is the intent of the authorities as distinguished from their motive, to bring about the forbidden results. The authorities are conclusively held to intend to accomplish the ordinary, natural and probable results of their acts. The forbidden intent, and whether it has impelled the action of officials, can be ascertained only by considering what is the ordinary, natural, and direct result of such administration of the law upon the rights of the parties, as fixed and determined by the conditions and situations which they occupy, with reference to the subject matter to which such administration of the law relates."

Apply the law and the reasoning of the foregoing cases to our case.

Our property is to be destroyed. The *property of the city*, identical in character, similarly located, is to be protected, preserved, used.

Can a more unjust, unfair, unequal application of the law, of the ordinance, be imagined than that shown in this case?

Where have the plaintiffs in error *the equal protection of the law* guaranteed by the constitution?

We submit that, even if it should be held that the ordinance is valid, its administration, its application, entitle us to the injunction prayed for.

SAID ORDINANCE No. 4170 (NEW SERIES) DEPRIVES OF VESTED RIGHTS WITHOUT DUE PROCESS OF LAW AND WITHOUT COMPENSATION.

The ordinance under which the destruction of the building is sought, attempts to deprive of vested rights, acquired years before its enactment.

The building was a substantial building, costing $12,000, erected without protest, an oven, constituting a part of said building, and costing $700, having been installed with the consent of and under the written permit and supervision of defendants.

The building was assessed and taxed by the city and the taxes paid by plaintiffs in error from the time of its erection to the present time. (Transcript, pp. 21 and 22, fols. 44 and 45.)

While it needs no citation of authorities to sustain the proposition that an ordinance or a statute depriving one of vested rights is unconstitutional as in violation of the Constitution of the United States, we call your honors' attention to the following:

In Mulligan v. Smith, 59 Cal. 230, the Court says:

> "For it is a principle which underlies all forms of government by law, that a citizen shall not be deprived of life, liberty, or property, without due process of law. The Legislature has no power to take away a man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him, and for a full opportunity of time, place and tribunal, to be heard in defense of his rights. This constitutional guar-

anty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty, or property, *whether the proceeding be judicial, administrative, or executive in its nature.*"

Again,

"But no man may be divested of his property or of his rights to property, without process of law. As a jurisdictional prerequisite he is entitled to his notice and his hearing, and only after such notice and hearing may the action of the Court be upheld."

Thompson v. Superior Court, 119 Cal. 543.

In Detroit v. Detroit & Howell P. R. Co., 27 Conn. 140, it was held that a provision of a charter requiring any plank road company to remove its toll gate beyond municipal limits is invalid and unconstitutional as taking property without due process of law.

If the Board of Public Works of San Francisco can lawfully exercise such power as it proposes to do in this case, if it can proceed without let or hindrance at its discretion to destroy any building in its unrestrained judgment without hearing, without opportunity to the owner given to object or to show that their conclusions are wrong, then every man holds and occupies property in this city and county solely subject to their leave and license and any man's building may be pulled down over his head whenever they for any reason consider it proper that it should be done. Surely the taxpayers do not hold their property upon so

fragile a tenure. It is the settled law that a building, when erected, will not, merely because it is a wooden building, be allowed to be removed or destroyed, because of a subsequently enacted ordinance, making the building or its maintenance unlawful.

In re Yick Wo., 68 Calif. 294 (298).

See, also,

Dobbins v. Los Angeles, 195 U. S. 223 (49 L. Ed. 169);

Morton v. Weisinger, 58 Or. 80 (113 Pac. 7).

THE ORDINANCES IMPAIR OBLIGATIONS OF CONTRACTS.

When the city permitted us to erect the building, there was at least an implied contract upon its part that we should enjoy the building, that we should be permitted to maintain the building. When it permitted us to erect the building, it also gave to us the right to enter into contract with others for the enjoyment of the use of the building. The building must have been erected with the idea that contracts for leasing would be entered into.

Having entered into these various contracts, we should be permitted to enjoy their fruit and we should not be put into a position where we may be subjected to heavy damages for violation of our contract, without our fault, and by the unauthorized acts of defendants.

The violation of an implied contract is as serious a matter as the avoidance or the impairment of an express contract.

The ordinance says:

> "It shall be unlawful for any person • • • *to erect, place or maintain any wooden building or structure of any kind whatsoever in that portion,*" etc.

No matter *when* the building was erected, no matter what kind of a building it may be, it cannot, if the ordinance is valid, be maintained or erected or placed within that district.

The prohibition is *not* limited to buildings erected at any particular time, and strange to say, is not limited to structures of any kind whatsoever.

"And wooden building" means any wooden building, *whenever erected.*

Judge Searles in the case of In the Matter of Yick Wo, 68 Cal. 294 (298), said:

> "To prevent the construction of wooden buildings within the densely inhabited portions of the city may become an imperative duty upon the part of the authorities. *They may not destroy those already erected.*"

In N. P. R. Co. v. Spokane, 52 Fed. 428, it was said:

> "A city has no authority to destroy a wooden building within the fire limits because it is maintained in violation of the permit granted for its erection, and an injunction to restrain such destruction is proper."

"The general rule is that mere police legislation of this character operates only *prospectively*, and does not demand the sacrifice of existing physical property. Freund, Police Power, § 538; Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443."

Jackson v. Miller, 60 Atl. 1019 (69 N. J. Eq. 82).

In the same case the Court said:

"The ordinance regulating the height of wooden fences was passed after the erection of the fence, and the fence not being in itself a nuisance which required immediate abatement in the interest of public safety, the owner is entitled to test the validity of the ordinance as affecting his property, if it should be held to extend to the maintenance of an existing fence. Even a law requiring all frame buildings within certain limits to be taken down, or preventing their use, would probably be held unconstitutional. Id ° ° ° The ex parte opinion of the superintendent of buildings that the maintenance of the fence is a violation of the ordinance is of no effect whatever as a judgment upon the question, and legislation giving it that effect would be unconstitutional." (Citing authorities.)

It must be remembered that no claim is made that the building in question is a nuisance.

In Morton v. Weisinger, 58 Or. 80 (113 Pac. 7), the Court said, (speaking of a San Francisco ordinance),

"Municipal ordinances establishing fire limits cannot be retroactive and require the removal of existing building therefrom."

See, also,

Denver v. Mullen, 7 Colo. 345 (353);
Hutton v. Camden, 39 N. J. L. 122.

If the above be not the law, let us see what would be the consequences!

In San Francisco there are today probably five thousand or more buildings which were not erected in accordance with the building ordinances as they exist today. In some cases it is because the ceilings are too high, or the ceilings are too low, or the studding is not of the thickness required by the present ordinances. Would it be supposed for a moment that the Board of Public Works could now, without any notice, proceed to tear down these buildings, or what would be the equivalent, compel the owners of the buildings to reconstruct them?

This is not a mythical case at all. It is a fact which confronts us. Certainly if the Board of Public Works has the right to do what it is attempting to do in this case, then it could cause damage of the amount of millions upon millions of dollars in the City and County of San Francisco by compelling owners either to reconstruct buildings or to tear down the buildings.

City of Buffalo v. Chadeayne, 134 N. Y. 163, was an action to recover a penalty for an alleged violation of an ordinance prohibiting the erection of a wooden building within the fire limits. The building was erected by the permission of the city

council. The council afterwards rescinded the permission and sued.

The Court held that the owner of the building had, by the permission, acquired vested rights of which the council had no power to deprive him, and that the action was not maintainable.

In Detroit v. Detroit & Howell P. R. Co., 43 Mich. 140, it was held that an Act requiring a plank road company to remove its toll gate beyond municipal limits, the right to so place its gates having been previously given, was invalid as taking property without due process of law.

Certainly to demolish our property would be to take or destroy it without any process of law.

Said ordinance is retroactive.

Not only does it attempt to make unlawful the erection of a wooden building, but it also attempts to make unlawful the *maintenance* of a wooden building *erected at any time*, no matter whether the building was erected before the alleged enactment of said ordinance or since that time.

In re Yick Wo, 68 Cal. 294 (298), the Court said:

> "To prevent the construction of wooden buildings within the densely inhabited portions of a city may become an imperative duty on the part of the authorities. *They may not destroy those already erected.*"
>
> Morton v. Weisinger, 58 Or. 80 (113 Pac. 7);
>
> Dobbins v. Los Angeles, 195 U. S. 223 (49 L. Ed. 169).

This doctrine has never been changed in the State of California, and is based on the soundest reasons.

In addition to this the ordinance deprives us and our tenants of rights acquired before the enactment of the ordinance.

For example, the tenants who are conducting businesses under licenses issued to them by the said city and county are cut off in the middle of their terms without redress.

We, having entered into contract with our tenants, are deprived of the benefits of those contracts entered into before the enactmnt of the ordinance and at a time when there could be no question of the right to enter into said contracts.

Wayman Inv. Co. v. Wessinger, 13 Cal. App. 108.

Not only would we be deprived of the benefits of the contracts, but we may be rendered liable for heavy damages because of our inability, following the demolition or removal of the building, to carry out the terms of the contracts on our part to be performed.

Thus it will be seen that not only is this ordinance retroactive in the ordinary sense, but retroactive in the fullest sense of an ordinance which is unlawful in that it deprives parties of rights acquired before its passage; not only of rights, but of vested rights.

In 24 Amer. Eng. Ency. of Law it is said, page 877:

> "Every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective, in its operations and opposed to those principles of jurisprudence which have been universally recognized as sound."

Mr. Justice Story in Society etc. v. Wheeler, 2 Call (U. S.) 139, says:

> "Upon principle every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past must be deemed retrospective."

Freund on Police Power, sec. 685 (p. 708), says:

> "Thus the establishment of fire limits within which *frame* buildings are forbidden is a regulation as applied to vacant property, while as to existing frame houses it would be a taking of property; hence the exemption of such houses is not only not contrary to, but is demanded by, the constitution."

Again in sec. 538 he says:

> "Therefore the general rule is that such legislation operates only prospectively, and does not demand the sacrifice of existing physical property. So the prohibition of wooden buildings within designated 'fire limits' applies only to buildings to be erected in the future."

In City of Buffalo v. Chadeayne, 134 N. Y. 163, 165 and 166, an action to recover a penalty for the erection of a wooden building within the fire limits, which building was erected under a permit from the common council, the Court held that having received permission to erect the building,

> "as soon as he entered upon the construction of the buildings and incurred liabilities for the work and material, he had a property interest in them. To this right he was entitled to protection".

After this the resolution authorizing him to build was rescinded, and on this subject the Court said:

> "The State has given to the municipality power to prescribe the limits in which wooden buildings shall not be erected. *This pertains to the future,* and not to existing buildings."

See, also,

Jackson v. Miller, 60 N. J. Eq. 182;
Cleveland v. Lenze, 27 Ohio St. 385 (390);
Inhabitants of Watertown v. Sawyer, 109 Mass. 320;
Brown etc. v. Hunn, 27 Conn. 382.

THE ORDINANCE IS UNREASONABLE.

What can be said of an ordinance which will permit a building to be constructed of paper, of canvas, of celluloid, of cardboard, of beaver board, or of any other inflammable material and yet prevent the construction of a wooden building, far less inflammable than any of the others?

If this is not unreasonable, it is hard indeed to imagine anything which is unreasonable.

Under that ordinance, if we had nine canvas tents, with iron poles, or nine houses built of beaver board, or of any other material than wood, we could enjoy and maintain them without hindrance.

There is implied in every delegation of power to a municipal corporation a condition that the power must be exercised reasonably; and hence every unreasonable ordinance is *ultra vires* and void.

Reasonableness is one of the inherent limitations of the police power.

Freund on Police Power, sec. 63.

This Court said in Plessy v. Ferguson, 163 U. S. 537.

> "The reply to all this is, that every exercise of the police power must be reasonable."

The ordinance declares it unlawful, not only to erect or maintain any *wooden* building, but also *any structure of any kind whatsoever.*

It may be contended that the word "wooden" refers to structure; but the construction of the sentence is such that it cannot be so interpreted.

The words "of any kind whatsoever" would be entirely unnecessary if the word "wooden" referred to structure. If necessary, it should have been applied to "building" and have read, "any wooden building of any kind whatsoever" or "any wooden structure of any kind whatsoever".

In our opinion the only correct and possible reading of the ordinance declares unlawful, not only the erection and placing or maintaining of any wooden building, but also the erection, placing or maintaining of any structure of any kind whatsoever.

In our opinion the erection of a steel building or brick building or any other kind of building or structure is forbidden if the word "structure" includes "building".

If, on the contrary, the word "wooden" applies to "structure", then it is unlawful for any one within that district to keep in his house or office, a wooden desk or chair or bookcase, for the word "structure" includes all these articles.

For instance, in State v. Kean, 45 Atlantic Reporter 256, a baywindow was held to be a structure.

In Phoenix Insurance Company v. Luce, 11 Ohio Cir. Ct. R. 476-483, a boiler and engine were held to be structures. In Karaseck v. Peier, 22 Wash. 419 (61 Pac. 33), and Jackson v. Miller, 69 N. J. Eq. 182, it was held that a fence was a structure.

So a telegraph pole, a wharf, a bridge and various things other than buildings have been held to be structures.

If the word "structure" were used without any intensifying words, "of any kind whatsoever", it might be contended possibly that the word "struc-

ture" meant a building. But to speak of "any structure of any kind whatsoever" must mean what it says.

The Standard Dictionary defines a structure to be "that which is constructed; a combination of related parts, as a machine, a building or a bridge".

Is or can there be imagined anything more highly unreasonable than this, especially when we consider the vast amount of territory covered by the ordinance?

It will not do to say that only a building is meant. If that had been the case, there was no necessity for putting in "structure". If that had been the case, there was no necessity for putting in "structure of any kind whatsoever".

Upon its face the ordinance unquestionably makes a vast waste of a large part of the city.

We submit that such an ordinance cannot be held to be valid.

DEFENDANTS HAVE NO LEGAL POWER TO DO THE ACTS THEY THREATEN TO DO.

The charter prescribes the powers of the Board of Public Works, and provides that said Board shall have the *supervision* of any and all *building construction* in the city and county.

> "The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors * * * of the supervision

of any and all building construction of the City and County." Charter subd. 5, sec. 9, chap. I, Art. VI.

Building construction of course refers, either to the construction of new buildings or the alteration and repair of old ones.

Construction cannot be twisted or distorted to mean "destruction" or "demolition or removal".

The control of the Board ceases the moment the *construction* is completed, that is when the building is erected or the alterations and repairs finished.

The Supervisors cannot give to the Board any greater power or authority than that conferred by the charter.

All powers possessed by the Board of Supervisors are derived from the charter, and the only way those powers can be increased is by an amendment to the charter.

DEFENDANTS ARE ESTOPPED FROM DESTROYING OR REMOVING THE BUILDING.

We submit further that the City and County of San Francisco and its servants are estopped by the actions of the city from proceeding in this matter.

That the city can be estopped, has been held in numerous cases.

City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 368;

City of Los Angeles v. Cohn, 10 Cal. 373;

Martel v. E. St. Louis, 94 Ill. 67.

Where a city did not object to the preliminary outlay for laying gas pipe, it was held estopped to deny the use of the streets for that purpose in

Atlanta v. Gate City Gaslight Co., 71 Ga. 106.

And where a municipality allowed expensive buildings to be erected without a warning, knowing that they were to be used for a purpose forbidden by a city ordinance, it was held estopped from asserting that ordinance in

Athens v. Georgia etc. Rd., 72 Ga. 800.

See also

Dobbins v. Los Angeles, 195 U. S. 223.

In the case at bar an expenditure of $12,000 was allowed, a written permit for the installation of an oven costing $700 was given, and the oven was installed in the building under the supervision of defendants. The city collected taxes from us, is going to collect more taxes now due under penalty of selling us out, has licensed the tenants to do business and has collected money for doing so, has allowed the building to be used and maintained for years without protest or interference, and all with full knowledge of the construction and maintenance of the building.

The city itself is maintaining many buildings of the same *construction* under identical circumstances, except that no taxes are paid thereon, all of which were erected subsequent to the erection of ours.

How can the city claim the right to destroy our property under those circumstances?

If it proceeds to destroy our building, yet it will collect from us taxes on the building it destroyed!

It seems to us that this is a case where the doctrine of estoppel should and does apply.

The sums of money involved are large—the damage which will be done us is incapable of estimation, and is irreparable.

In Martel v. E. St. Louis, 94 Ill. 67, it was held that a city cannot recover a penalty from a person pursuing a trade or calling, where, for a consideration paid it, a license authorizing him to carry on such trade or calling has been issued to him, and *it is of no consequence whether the ordinance under which the privilege was granted was valid or invalid* as the action of the city in issuing the license induced the violation complained of, and under such circumstances *it is estopped from questioning the validity of the license or privilege.*

In C. R. I. & P. R. R. Co. v. City of Joliet, 79 Ill. 25, a city had recognized the right claimed by a railroad company over certain "public grounds" of the city in various ways, and among others, by the levying of taxes, and the Court said:

> "The levying of local taxes under the ordinances of the city, was, in effect, a declaration upon the part of the city that the county was the owner of this property; an admission that it had the dominion over it, and the right of directing its use, and consequently a virtual assent to and confirmation of the grant of the right of way over the same, which it had made to the railroad company.

> "From all these positive acts of recognition on the part of the city of Joliet of the right claimed by the railroad company, and long acquiescence in its exercise, there must be held to be estoppel *in pais* against the city, if that principle be applicable at all to municipal corporations, as respects public rights."

In Dobbins v. Los Angeles, 139 Cal. 179, the Supreme Court of California had held that the fact that the plaintiff had lawfully commenced its work by purchasing land for a site for gas works within the limits allowed by the ordinance then in force, and had expended money in laying a foundation, and had entered into contracts for the erection of its works, and had secured a building permit from the fire commissioners in pursuance of fire and building ordinances, could not estop the city from the further exercise of its police power to change the limits so as to make the erection of such gas works unlawful, although lawfully begun, and despite the consent of the city evidenced by the issuance of a building permit.

This court, in Dobbins v. Los Angeles, 195 U. S. 223 (49 L. Ed. 169) reversed the judgment of the Supreme Court of California, holding the ordinance changing the limits (under the facts as admitted by demurrer) was an arbitrary interference with property rights protected by the Fourteenth Amendment to the Constitution of the United States.

In our case, the city permitted the erection of the building at a cost of $12,000, express written

permission to construct an oven at an expense of $700 was given, for nearly ten years has acquiesced in our erection and maintenance of the building, has during all the time since its erection levied and collected taxes thereon, has issued licenses to and received money from our tenants, and is now, we submit, estopped from claiming that the building was improperly erected, and from interfering with our peaceable enjoyment of the property.

CLEAN HANDS.

In the State Courts counsel for defendants argued that we cannot attack Ordinance 4170, because we have "erected a wooden building in violation of the law", and are continuing "in violation of law to maintain it to the present time".

They assumed that the charter and Ordinance 1198, made it unlawful to erect the building, which, we think we have shown to be an erroneous assumption.

Doesn't it seem rather strange for the city which is compelling us to pay taxes on this building, which has received thousands of dollars from us as taxes on the building, has charged our tenants for the privilege of doing business in the building, and which is itself maintaining like buildings, erected after ours was erected, thus making an unjust and discriminatory application of the ordinance in its own favor, and against plaintiffs in error, to charge us with having unclean hands?

But, aside from this, if the alleged ordinance is unconstitutional, it is a nullity; it is not a law, it is—nothing.

This Court in Norton v. Shelby County, 118 U. S. 425 (30 L. Ed. 178), said:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

In Minnesota Sugar Co. v. Iverson, 97 N. W. (Minn.) 454, the Court said (p. 457):

> "It has again and again been held that an unconstitutional statute is simply a statute in form, is not a law, and under every circumstance or condition lacks the force of law, and, further, that it is of no further saving effect to justify action taken under it than as though it had never been enacted."

In People v. Mensching, 187 N. Y. 8 (79 N. E. 884), the Court said of an unconstitutional statute:

> "It changes nothing and does nothing. It has no power to coerce or release. It has no effect whatever. *In the eye of the law* it is a mere blank, the same as if the type had not reached the paper".

and then proceed to quote the above from Norton v. Shelby County.

Cooley's Constitutional Limitations (7th ed.) p. 5, says:

> "The term 'unconstitutional law', as employed in American jurisprudence, is a mis-

> nomer, and implies a contradiction; that enactment which is opposed to the Constitution being in fact no law at all."

In In re Rohrer, 43 Fed. Rep. 556, where the so-called "Wilson Bill" passed by Congress because of the decision as to the state original package liquor laws, was under consideration, the Court said:

> "For it must be kept in mind that legislative act in conflict with the Constitution is not only illegal or voidable but it is absolutely void. It is as if never enacted, and no subsequent change of the Constitution removing the restriction could validate it or breathe into it the breath of life."

If Ordinance 4170 is unconstitutional, respondents are in the position of presenting a piece of blank paper as their authority for their proposed actions.

We respectfully submit,

(1) That the Charter Provision cited is not self-executing;

(2) That the Ordinance 1198 did not prohibit the erection of the building;

(3) That Ordinance 1008 (new series), enacted after the erection of the building, is *prospective*—not retrospective;

(4) That if retrospective, it is unconstitutional as being retroactive and unreasonable;

(5) That Ordinance 4170 (new series) is void and unconstitutional,

(a) Because retroactive,

(b) Because it attempts to destroy property and deprive of vested rights without due or any process of law,

(c) Because it authorizes the determination, without a hearing, that property is unlawfully erected,

(d) Because it is unreasonable;

(6) That each of said ordinances is and all are void because discriminatory;

(7) That the attempted action of defendants is unlawful and void because discriminatory, and because with no lawful authority;

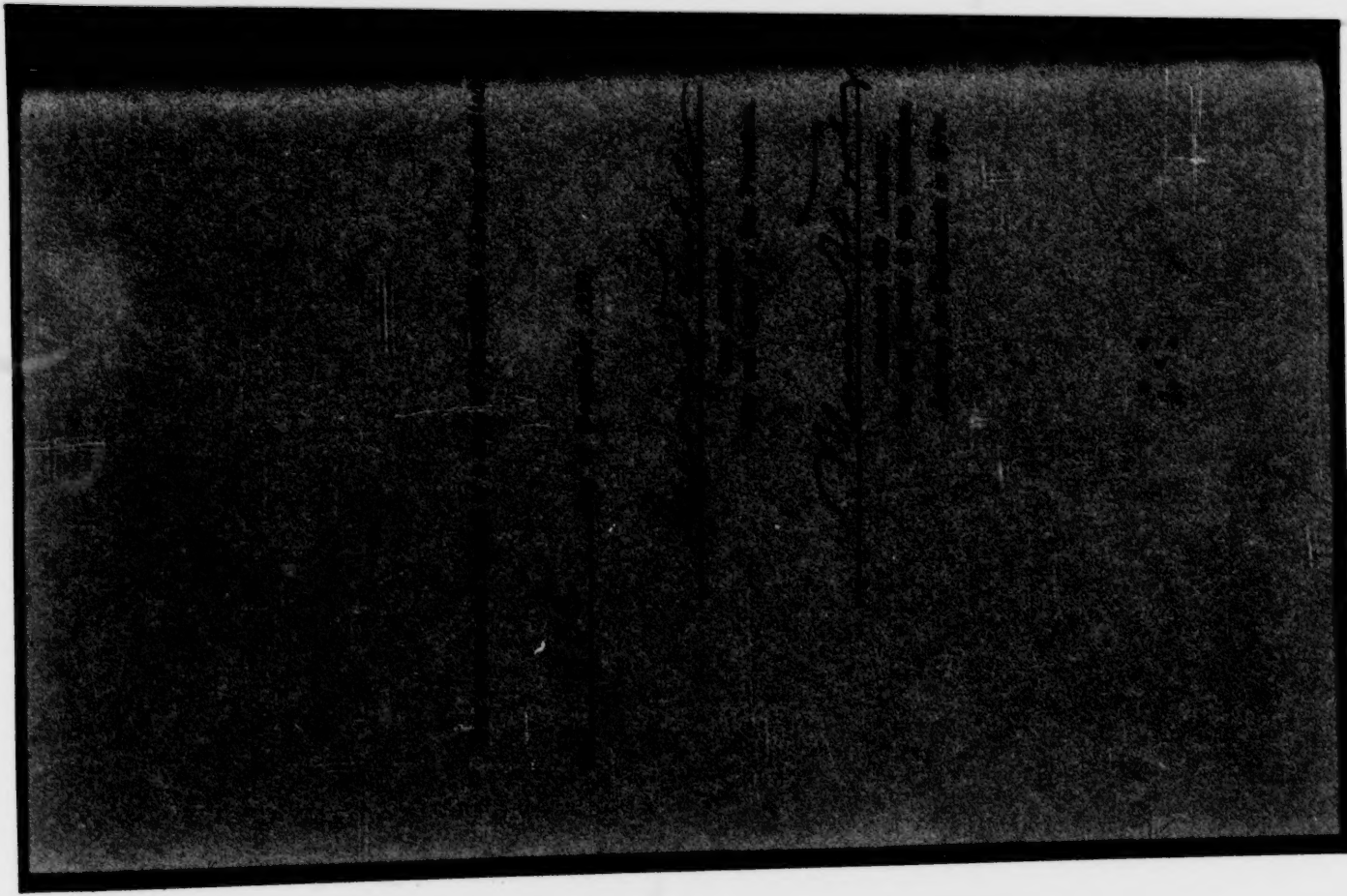
(8) That the application of said ordinances has voided and nullified them.

We therefore urge that the judgment should be reversed and that the prayer of the plaintiffs in error for a permanent injunction as asked for in their complaint be granted.

Dated, San Francisco,
December 27, 1920.

Respectfully submitted

J. F. RILEY,
Attorney for Plaintiffs in Error.



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No. [redacted]202

MICHAEL MAGUIRE and C. S. MAGUIRE,
Plaintiffs in Error,

vs.

TIMOTHY A. REARDON et al., as Commissioners, Constituting the Board of Public Works of the City and County of San Francisco et al.,
Defendants in Error.

In Error to the District Court of Appeal of the State of California in and for the First Appellate District, Division One.

BRIEF FOR DEFENDANTS IN ERROR.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No. 607

MICHAEL MAGUIRE and C. S. MAGUIRE,
Plaintiffs in Error,

vs.

TIMOTHY A. REARDON et al., as Commissioners, Constituting the Board of Public Works of the City and County of San Francisco et al.,
Defendants in Error.

In Error to the District Court of Appeal of the State of California in and for the First Appellate District, Division One.

BRIEF FOR DEFENDANTS IN ERROR.

Defendants in error are the members of the Board of Public Works and Chief Building Inspector of the City and County of San Francisco, and the City and County of San Francisco. Plaintiffs in error are the owners of a wooden building which was

built and is being maintained within the fire limits of the City and County of San Francisco as established by a certain Ordinance No. 1198 of the said city and county prior to the date of the erection of said wooden building. Under authority vested in them by a certain Ordinance No. 5140 (New Series), the Board of Public Works were proceeding to demolish said building when this action was commenced in the Superior Court of the State to enjoin and prevent its demolition. Judgment went for defendants in error in the Superior Court, and this judgment was affirmed by the California District Court of Appeal, First Appellate District, Division One. The State Supreme Court denied a rehearing. The case comes to this Court on writ of error to the State Court.

The wooden building here in question was constructed shortly after the great fire and earthquake which laid such a large part of San Francisco in ruins in April, 1906. Hardly a building was left standing within the fire limits, and the necessity for some immediate and drastic step to afford temporary relief was too obvious to need comment here. What was done by the officials of San Francisco in this emergency may best be told in the language of the Supreme Court of the State of California in the case of Howell v. City of Hamburg Co., 165 Cal. 172, at pp. 175-6:

> "In the face of the great necessity for temporary buildings in San Francisco immediately following the conflagration of April 18, 19 and

20, 1906, the municipal authorities of the city and county unofficially announced that the construction of temporary wooden frame buildings within said fire limits would be permitted until July 1, 1906, but that all said buildings would be subject to removal at the pleasure of the authorities. * * *

The charter of the city and county of San Francisco authorizes the board of supervisors to fix the limits within which wooden buildings or structures shall not be erected or maintained, and provides that 'such limits when once established shall not be changed except by extension'. (Charter, chap. II, sec. 5.) So that it would seem that the supervisors would have had no authority after the fire, even by ordinance, to permit the erection of any wooden building within the limits previously defined as the fire limits, the charter provision limiting their powers in this behalf. But they did not even purport to so do by ordinance, which even if there were no charter provisions would be essential to any change in existing ordinances on the subject. All that there was in this case in effect was the unofficial announcement of the municipal authorities that they would regard the law on the subject suspended for the time being and would not attempt to enforce it, which was followed by the actual failure on the part of such authorities to enforce the same. The good faith both of the authorities and those erecting wooden buildings under the assurance thus given is not to be questioned in the slightest degree. It may freely be conceded that the emergency was such as to morally justify the authorities and those acting upon their assurances in doing as they did. But of course the law could not be changed in any such way. The ordinances on the subject continued in force unaffected by the unofficial announcement in the slightest degree, with the result that the con-

> struction of this building on this lot, which was expressly provided for in the lease, was 'contrary to an express provision of law,' and therefore 'not lawful' (Civ. Code, sec. 1667), on May 17, 1906, and at all times thenceforth."

It is clear that the few wooden buildings which still remain from this period have long outlived the "moral justification" spoken of in the quoted portion of the opinion.

I.

THE STATE COURT HAS SETTLED THE CONSTRUCTION OF THE ORDINANCES AND CHARTER PROVISION INVOLVED HEREIN. THIS COURT ON WRIT OF ERROR TO THE STATE COURT WILL NOT REVIEW THE CONSTRUCTION OF STATE LAWS BY THE STATE COURT.

The Charter of the City and County of San Francisco provides in subdivision 5 of section 1, Chapter II, Article II, as follows:

> "Section 1. Subject to the provisions, limitations and restrictions in this Charter contained, the Board of Supervisors shall have power * * *
>
> 5. To fix limits within which wooden buildings or structures shall not be erected, placed, or maintained, and to prohibit the same within such limits. Such limits when once established shall not be changed except by extension."

Ordinance No. 1198 provides in section 1 thereof that

> "The fire limits shall be bounded by a line commencing * * *" (followed by a description of metes and bounds).

A large part of the brief of plaintiffs in error is taken up with an attempt to show that Ordinance No. 1198 which described certain "Fire Limits", within which the wooden building in question was situated, did not have the effect of prohibiting the construction of wooden buildings within such fire limits. The State Court held specifically that this Ordinance No. 1198, taken in connection with subdivision 5 of section 1, Chapter II, Article II of the Charter of the City and County of San Francisco, did have the effect of prohibiting the construction of wooden buildings within the fire limits. The District Court of Appeal, citing Bancroft v. Goldberg, Bowen & Co., 16 Cal. App. Dec. 37, and the same case on rehearing in 166 Cal. 416, held that

> "the effect of the ordinance and the charter provisions is to make the erection or maintenance of a wooden building within the fire limits, as defined in the ordinance, unlawful". (Tr. of Record p. 34.)

The jurisdiction of this Court on writ of error to a State Court is limited to the consideration of certain Federal questions. (Section 237, Judicial Code.) The construction of State legislation is a local, not a Federal, question, and the decision of the State Court thereon is not subject to review by this Court on writ of error to the State Court.

> Missouri v. Dockery, 191 U. S. 165, 48 L. Ed. 133;

Lombard v. West Chicago Park Commrs., 181 U. S. 33, 45 L. Ed. 731;
Marshall v. Ladd, 19 L. Ed. 153;
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Martin v. West, 222 U. S. 191, 56 L. Ed. 159;
Smiley v. Kansas, 196 U. S. 447, 49 L. Ed. 546;
The Winnebago, 205 U. S. 354, 51 L. Ed. 836;
Gatewood v. North Carolina, 203 U. S. 531, 51 L. Ed. 305;
Clement National Bank v. Vermont, 231 U. S. 120, 58 L. Ed. 147;
Fischer v. St. Louis, 194 U. S. 361, 48 L. Ed. 1018;
Danciger v. Cooley, 248 U. S. 319, 63 L. Ed. 266;
Price v. Illinois, 238 U. S. 446, 59 L. Ed. 1400;
Morley v. Lake Shore etc. R. Co., 146 U. S. 162, 36 L. Ed. 925;
Osborne v. Florida, 164 U. S. 650, 41 L. Ed. 586.

It follows that this Court will accept the construction placed upon this ordinance and Charter provision by the State Court. As so construed, it did prohibit the erection of the building here in question.

A large part of the argument of plaintiffs in error is taken up with the question whether Ordinance No. 1198 is sufficiently definite in its terms. The State Court has held that it is. This Court said in Osborne v. Florida, cited *supra:*

> "The second ground for holding the statute void is that it is not sufficiently determinate, definite, and certain in its character upon which to ascertain the amount to be paid for licenses. This ground furnishes no reason for interference by this court. Whether the statute be sufficiently determinate or certain in its character upon which to ascertain the amount to be paid for a license is a question of the construction of the state statute which does not necessarily involve a Federal question, and the determination of the state court as to the proper construction and sufficiency of such a statute is conclusive upon us."
>
> 164 U. S. 656, 41 L. Ed. 588.

Counsel for plaintiffs in error also relies largely upon the contention that the Charter provision in question is not self-executing, and cites in support of his contention several previous California decisions construing other statutes and constitutional provisions. But on this question the conclusion of the State Court in the case under review is likewise controlling, even though it be (which we do not concede) inconsistent with the reasoning of prior decisions, or with what this Court may consider proper rules of statutory construction.

This Court disposed of a similar argument in Lombard v. West Chicago Park Commrs., cited *supra*, in the following language:

> "The theory lying at the foundation of all the arguments advanced to show that the court below committed error of a Federal nature is this, and nothing more, that the equal protection of the laws was denied by the Supreme Court of Illinois, because that Court, although

> it treated the assessing ordinance as invalid for the purposes of the first assessment, upheld that ordinance as valid for the second assessment. This but asserts that, because it is considered that there was inconsistency in the reasoning by which the Supreme Court of Illinois sustained its conclusion, therefore the equal protection of the laws are denied. If the proposition as thus understood was held to be sound, as it cannot be, every case decided in the courts of last resort of the several states would be subject to the revisory power of this court, wherever the losing party deemed that the reasoning by which the state court had been led to decide adversely to his rights was inconsistent with the reasoning previously announced by the same court in former cases."
>
> 181 U. S. 44-45, 45 L. Ed. 738.

Plaintiffs in error also urge that under the Charter of San Francisco the power to demolish the building in question could not be conferred on the Board of Public Works. The State Court decided otherwise (Tr. of Record p. 36) and under the authorities above cited that decision is likewise controlling upon this Court.

II.

THE DECISION OF THE STATE COURT THAT ORDINANCE NO. 1198 TAKEN IN CONNECTION WITH THE CHARTER PROVISION HAD THE EFFECT OF PROHIBITING THE CONSTRUCTION OF WOODEN BUILDINGS WITHIN THE FIRE LIMITS IS IN ANY EVENT CORRECT.

While we are satisfied that this Court will not review the construction placed upon Ordinance

No. 1198 by the State Court, nevertheless, counsel for plaintiffs in error have devoted so much of their brief to the question of the proper construction of this ordinance that we may be pardoned for briefly stating the reasons why in our opinion the decision of the State Court upon this question was correct.

A. Ordinance No. 1198 must prohibit the construction of wooden buildings or it is a nullity. But it is a settled rule of statutory construction that statutes must be given effect if possible.

It is a settled rule of statutory construction which has been incorporated in our California Civil Code that

> "An interpretation which gives effect is preferred to one which makes void".
>
> Civil Code, sec. 3541.

> "It is a cardinal rule that all statutes are to be so construed as to sustain rather than ignore or defeat them; to give them operation, if the language will permit, instead of treating them as meaningless: *ut res magis valeat, quam pereat.*"
>
> Lewis' Sutherland on Statutory Construction, 2nd Ed., Vol. II, p. 927, sec. 498.

The Court said in construing a statute in Kaiser etc. Co. v. Curry, 155 Cal. 638, 647:

> "Any other construction would render the act absolutely worthless, so far as its practical effect is concerned, and certainly we are not to attribute to the legislature an intention to bring about such a result, unless that intention is plain."

In Warren County v. Nall, 29 So. 735, the Court was asked to construe a statute in such a manner as to render it absolutely ineffective. In refusing to do so the Court said at page 737:

> "We must sustain the grant here involved, or we must adjudge that the legislature of the state in 1852 enacted a solemn farce. • • • It is equally as serious a matter for a court to adjudge an act of the legislature void on the assertion that, or because, its terms are so contradictory as to destroy it and deprive it of all meaning and effect. It should not be done if there be any reasonable way to escape from so doing."

To the same effect see:

Black on Interpretation of Laws, 2nd Ed., p. 132;

Hilburn v. St. Paul etc. Co., 58 Pac. 551, 554;

State v. Duis, 116 N. W. 751, 752;

Slocum v. Neptune, 53 Atl. 301, 302;

Hettel v. First Judicial Court, 96 Pac. 1062, 1064;

State v. Martin, 103 Pac. 840, 842;

The Emily and The Carolina, 6 L. Ed. 116.

Unless Ordinance No. 1198 is construed as prohibiting the erection of wooden buildings within the fire limits it must be construed as accomplishing absolutely nothing and the Court must determine, in the language of Warren County v. Nall, *supra*, that the Board of Supervisors in adopting it "enacted a solemn farce".

B. The term "fire limits" has come to have a well-settled meaning. It means a district within which the erection of wooden buildings is prohibited.

In Dillon on Municipal Corporations, 5th Ed., Vol. II, sec. 727, pp. 1103-4, the learned author says:

> "Municipal corporations, with general power to provide for the safety of their inhabitants * * * may * * * establish *fire limits*, and prevent the erection therein of *wooden buildings.*" (Italics ours.)

McQuillin in his work on Municipal Corporations, Vol. III, sec. 948, p. 2061, says:

> "Under the powers usually conferred, municipal corporations may prescribe *fire limits* and forbid the erection therein of *wooden structures.*" (Italics ours.)

In Freund on Police Power we likewise find:

> "On the other hand so far-reaching a limitation by municipal ordinance as the establishment of *fire limits within which wooden buildings may not be erected, has been upheld.* * * *"
>
> Freund, Police Power, sec. 33, p. 29.
>
> "Cities may, according to the predominant judicial opinion, establish *fire limits, within which the erection of frame houses is prohibited*" (Italics ours.)
>
> Id., sec. 141 p. 131.

So in a note in 9 Ann. Cas., 292, the author of the note says:

> "It is generally held that a municipal corporation which * * * has prohibited the

> *erection of wooden buildings* within a certain district, usually known as the *fire limits,* may, etc." (Italics ours.)

And in the Am. & Eng. Enc. of Law, 2nd Ed., Vol. XIII, at pp. 396 et seq., will be found an article entitled, "Fire Limits". This article is devoted exclusively to the single subject of the effect of ordinances prohibiting the construction of wooden buildings.

We thus see that the term "fire limits" is used consistently with a single meaning, to wit: the limits within which frame or wooden buildings may not be erected or maintained.

But "frame" and "wooden" are synonymous when applied to a building.

19 Cyc., p. 1450;
Olmstead v. Pac., 91 P. 113;
Ward v. Murphysboro, 77 Ill. App. 549.

So when the board of supervisors adopted the ordinance defining the fire limits it was exercising its power to fix the limits within which wooden buildings or structures shall not be erected, placed or maintained.

C. In the printed Charter subdivision 5, section 1, Chapter II, Article II, is designated by a marginal note "Fire Limits". Ordinance No. 1198 must be presumed to have been enacted with reference to this fact.

In the printed Charter of the City and County of San Francisco as adopted by the freeholders and approved by the legislature the district within which no wooden buildings may be erected, placed

or maintained as provided for in subdivision 5, section 1, Chapter II, Article II, is designated in a marginal note as "Fire Limits" (Statutes of California, 1899, p. 249). This is further evidence of the fact that the term "fire limits" has a well recognized meaning as stated hereinabove. In addition to this it must be presumed that the Board of Supervisors in adopting Ordinance No. 1198 were familiar with this Charter provision and its marginal note and used the term in the same sense in which that term was used in the marginal note to subdivision 5, section 1, Chapter II, Article II of the Charter.

III.

EVERY PRESUMPTION IS INDULGED IN FAVOR OF THE CONSTITUTIONALITY OF A STATE LAW AND THIS COURT WILL RESOLVE EVERY DOUBT IN FAVOR OF ITS CONSTITUTIONALITY.

In considering the constitutional questions raised by plaintiffs in error it must be borne in mind that every doubt is to be resolved in favor of the constitutionality of the ordinances attacked.

Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780.

And that this is especially true in a case where this Court is reviewing the decision of a State Court upholding them.

Welch v. Swasey, 214 U. S. 91, 53 L. Ed. 923;
Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. Ed. 515.

IV.

SAID ORDINANCES ARE NOT UNREASONABLY DISCRIMINATORY.

A. The rules for testing the contention of a denial of equal protection of the laws.

This Court in Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-9, 55 L. Ed. 369, 377, enunciated the following rules for testing a claim of unconstitutional discrimination:

> "The rules by which this contention (denial of the equal protection of the laws) must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest on any reasonable basis but is essentially arbitrary. (Citing cases.)"

B. Tested by these rules, the ordinances attacked are not shown to be unreasonably discriminatory.

1. The claim that the ordinances are discriminatory by reason of the fact that they do not prohibit the construction of buildings of other inflammable materials than wood is without foundation.

Plaintiffs in error have not sustained the burden of showing that the prohibition of wooden buildings without prohibiting buildings of other inflammable materials does not rest on a reasonable basis.

It is not alleged in the complaint nor found by the Court that buildings are commonly or at all constructed of paper, canvas or other inflammable materials in San Francisco or that there is within the fire limits any building constructed of any other such inflammable material. Nor is it alleged or proved that if buildings were built of paper or canvas they would be as inflammable as buildings of wood.

But apart from that, similar ordinances have been held valid in many jurisdictions.

In the following cases ordinances prohibiting "wooden buildings" within fire limits, and not referring to buildings of other inflammable material were held valid:

Canepa v. Mayor, 9 So. 180;
Kaufman v. Stein, 37 N. E. 333;
Hubbard v. Medford, 25 P. 640;
Olympia v. Mann, 25 P. 337;
Hine v. New Haven, 40 Conn. 478;

Salem v. Maynes, 123 Mass. 372;
Alexander v. Greenville, 54 Miss. 659;
Respublica v. Dugnet, 2 Yeates (Pa.) 493;
Baumgartner v. Hasty, 100 Ind. 575;
Wadleigh v. Gilman, 12 Me. 403;
Eichenlaub v. St. Joseph, 21 S. W. 8.

These regulations extending over many jurisdictions and taking in a wide period of time indicate a general and settled view throughout the United States that wooden buildings belong to a class which may properly be singled out for regulation. In this connection it should also be noticed that no one, so far as we have been able to ascertain, has ever before claimed that such an ordinance is unreasonably discriminatory because limited to wooden buildings. Such a widespread and general opinion is not to be disregarded in testing the constitutionality of the ordinances in question and this Court will not declare ordinances unconstitutional when the legislative conclusion has the support of public opinion or common belief.

Laurel Hill Cemetery v. San Francisco, 216 U. S. 356, 54 L. Ed. 515;
Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643;
Otis v. Parker, 187 U. S. 606, 47 L. Ed. 323.

In addition to this, police legislation is properly directed at existing or threatened evils, and, as we have pointed out, it is not alleged or found that even one building has ever been constructed in San

Francisco of inflammable materials other than wood. When the time arrives, if it ever does, that other inflammable materials are used or threatened to be used for the construction of buildings it will be time enough to legislate concerning them.

2. The claim of unreasonable discrimination by reason of the fact that the City and County of San Francisco is maintaining certain wooden buildings within the fire limits is not tenable.

a. *The State is not bound by general language in a statute.*

It is a settled rule of statutory construction that the sovereign government is not bound by general language in a statute.

Dollar Savings Bank v. U. S., 19 Wall. 227, 22 L. Ed. 80;

U. S. v. Herron, 20 Wall. 251, 22 L. Ed. 275;

U. S. v. North Carolina, 136 U. S. 211, 34 L. Ed. 336;

Guarantee etc. Co. v. Title etc. Co., 224 U. S. 151, 56 L. Ed. 706;

Milwaukee v. McGregor, 121 N. W. 642 (Wis.);

Goss v. Greenleaf, 57 Atl. 581 (Me.);

State v. Baker, 64 So. 993 (La).

This rule is well settled in California.

Molineux v. California, 109 Cal. 378;

Maythofer v. Board, 89 Cal. 110;

Savings etc. Society v. San Francisco, 131 Cal. 356;

Whitaker v. County of Tuolumne, 96 Cal. 100;
Berton v. All Persons, 176 Cal. 610.

It follows that the general prohibition against the construction of wooden buildings within the fire limits does not extend to the City and County of San Francisco, at least in its governmental capacity.

b. *The distinction between the governmental and proprietary functions of a municipality is well recognized. Acting in a proprietary capacity, the City and County of San Francisco might be bound by the fire limits ordinances, but not in its governmental capacity.*

The wooden buildings maintained by the City and County of San Francisco within the fire limits are two fire houses, two wooden buildings used as school rooms and one police station. (Tr. of Record p. 22.) In maintaining these buildings for these purposes, the City and County of San Francisco is clearly acting in its governmental capacity.

The distinction between the governmental and proprietary capacities of a municipality is well recognized.

Vilas v. Manila, 220 U. S. 345, 55 L. Ed. 491;
South Carolina v. U. S. 199 U. S. 437, 50 L. Ed. 261.

In its proprietary capacity it is treated much as any other corporation, but this is not true when it is acting in its governmental capacity. A compari-

son of the two cases cited below readily indicates the distinction.

New Orleans Gas Co. v. Drainage Comm., 197 U. S. 453, 49 L. Ed. 831;

Los Angeles v. Los Angeles Gas Corp., 251 U. S. 32.

A classification which puts the state and its governmental subdivisions while acting in their governmental capacity in one class and all private parties in another is certainly founded on a reasonable basis of distinction. How can it be said that plaintiffs in error are unreasonably discriminated against by such a classification? They cannot be held to be injuriously affected because they are not engaged in the business of maintaining public schools, fire houses or police stations. If the city was maintaining wooden buildings for stores in competition with them they might then be heard to complain.

The furnishing of police and fire protection and the means of education to its citizens are among the most important functions of government. Certainly if the legislative body finds in its discretion that it is of greater importance to exercise these governmental functions unhampered than to apply the provisions of the fire limits ordinance to itself, that determination will not be held by the Courts not to be based upon reasonable grounds.

Besides there is no showing upon the part of plaintiffs in error that the City and County of San Francisco has not located these buildings in such

a situation that they do not constitute a fire risk of any gravity, or that in their management they do not take precautions against fire risks which could not readily or efficaciously be imposed upon private individuals.

Plaintiffs in error complain that the city and county might in the conduct of its municipal railroad erect wooden car barns within the fire limits and prevent competing street railroads from doing the same. A complete answer to this claim is that the City and County of San Francisco has not done this.

In maintaining car barns it would be acting in a proprietary capacity and we may concede that while so acting it would be bound by the fire limits ordinance or lay itself open to a claim of unconstitutional discrimination. But until it seeks to do this that question cannot arise.

V.

ORDINANCE NO. 4170 (New Series) DOES NOT DEPRIVE OF VESTED OR ANY RIGHTS.

Plaintiffs in error having erected a wooden building in the fire limits in violation of law can have no vested rights therein.

> "There can be no acquisition of a right by the performance of an illegal act. In removing a building erected in violation of law * * * no private right is invaded, because none could grow out of the illegal act."
>
> Baumgartner v. Hasty, 100 Ind. 575.

In a somewhat similar case in New York the Court said of the owner of a wooden building within fire limits:

> "The counsel for respondent claims that his client, by reason of the consents obtained and the lapse of time, has vested rights. The difficulty is that he never had any rights to vest."
>
> Brooklyn v. Furey, 30 N. Y. S. 349.

> "Where the law prohibits the creation or acquisition of certain property, and thereafter in manifest contravention to it such property is created or acquired, it is perhaps not strictly speaking a nuisance *per se*, since it is not imminently dangerous, but it is evidently less entitled to consideration that property which is merely unlawfully used, since the status of the whole property is illegal *ab initio*. It has thus been held that a frame building erected in violation of law may be torn down summarily, preserving the material to the owner."
>
> Freund, The Police Power, p. 560, sec. 528.

Appellants' building being illegal *ab initio*, they could acquire no vested right therein.

VI.

SAID ORDINANCE IS NOT UNCONSTITUTIONAL AS IMPAIRING THE OBLIGATION OF CONTRACT.

The officers of the city could no more expressly or impliedly legally contract for the erection of a wooden building within the fire limits than could private individuals. Any such contract would be illegal and a nullity.

In Howell v. City of Hamburg, 165 Cal. 172, the Court said:

> "The Charter of the City and County of San Francisco authorizes the board of supervisors to fix the limits within which wooden buildings or structures shall not be erected or maintained, and provides that 'such limits when once established shall not be changed except by extension'. (Citing the Charter.) So that it would seem that the supervisors would have had no authority after the fire, even by ordinance, to permit the erection of any wooden building within the limits previously defined as the fire limits, the charter limiting their power in that behalf."

How can it be claimed then that any officers of the city could expressly or impliedly contract to permit this illegal building to be maintained?

It is likewise clear that any contracts entered into with tenants were made with knowledge that the building was illegal, and subject to the right of the city to remove it.

VII.

SAID ORDINANCE IS NOT RETROACTIVE.

The building here in question was erected in violation of law (Ordinance No. 1198) and has ever since been illegally maintained. It has always been forbidden by law. Ordinance No. 4170 (New Series) does not declare it unlawful for the first time. It simply provides a means of abating what was illegal *ab initio*. It does not make a building, lawful when erected, unlawful. It provides for the

demolition of buildings already unlawfully erected and maintained.

Plaintiffs in error also claim that the ordinance is unconstitutional as prohibiting the maintenance of wooden buildings lawful when erected. We do not so construe it. In any event, as said in Bancroft v. Goldberg, Bowen & Co., 16 Cal. App. Dec. 37:

> "It is not claimed that the ordinance would have a retroactive effect so as to make the maintaining of wooden buildings erected before its passage unlawful; but that question is not involved here, for the building under lease in this action was erected after the passage of the ordinance defining the fire limits".

This building was erected in violation of Ordinance No. 1198 after the fire limits were established. Plaintiffs in error cannot complain because the owner of a wooden building erected before the fire limits were established might be unconstitutionally affected. In order to attack the constitutionality of an ordinance they must show that it is unconstitutional as to them.

> "We may once more repeat what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution must show he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Federal Constitution."
>
> Plymouth Coal Co. v. Pennsylvania, 58 L. Ed. 713, 719, 232 U. S. 531, 544-5.

See also:

Laurel Hill Cem. v. San Francisco, 216 U. S. 358, 54 L. Ed. 515;

In re O'Brien, 75 Pac. 196, 198;

Farnum v. Cemetery Assn., 35 N. E. 271;

Standard etc. Co. v. Wright, 225 U. S. 623, 56 L. Ed. 1229;

Aluminum Co. v. Ramsey, 222 U. S. 251, 56 L. Ed. 185;

Castillo v. McConnico, 168 U. S. 674, 42 L. Ed. 622, 625.

VIII.

THE ORDINANCE IS NOT UNREASONABLE.

The ordinance applies to "any wooden building or structure of any kind whatsoever".

Counsel claims that the adjective "wooden" does not modify "structure". Clearly it does. The ordinance applies to wooden buildings and wooden structures. The Court will, of course, construe it reasonably.

Counsel are needlessly alarmed over the fact that wooden chairs, desks, etc., being structures, as they claim, are made illegal by this ordinance. Under the rule *ejusdem generis* "structure" must be construed as of the same general character as a building. So construed, the ordinance is clearly reasonable.

IX.

THE ORDINANCE DOES NOT DESTROY PROPERTY WITHOUT DUE PROCESS OF LAW.

The building here in question, as we have already pointed out, was erected in the fire limits and was illegal *ab initio*. A wooden building erected in violation of a fire limits ordinance may be summarily destroyed without any judicial proceedings.

It is the general rule that when property is imminently dangerous it may be summarily destroyed without notice or hearing, and that the owner's remedy is by an action for damages after the destruction, if in fact the destruction was not justified. A good example of this rule is found in

> North American etc. Co. v. Chicago, 211 U. S. 306, 53 L. Ed. 195.

In that case this Court had under consideration an ordinance of the City of Chicago providing for the summary destruction of food in cold storage which was unfit for human consumption. The Court said:

> "We are of opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use is not necessary. The right to so seize is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon

> the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of the persons who eat it."

The same principle has been applied wherever the question of the summary destruction of wooden buildings within fire limits has been presented to the courts. A wooden building within the fire limits is imminently dangerous in the same way that unwholesome food is imminently dangerous, and so it may be summarily destroyed.

In 13 American & English Encyclopedia of Law at page 400 it is said:

> "Where a municipal corporation has power to prohibit the construction of wooden buildings within a district and has enacted an ordinance to that effect, it may remove any building erected in violation of the ordinance, and this, too, without any judicial proceedings whatever." (Citing many cases.)

In

Miller v. Sergeant, 37 N. E. 418,

the Court of Appeals of Indiana said of the power to destroy wooden buildings within fire limits:

> "Such power may often be exercised in a summary manner. Every community has the right of self-preservation. When a public nuisance creates an imminent danger, a necessity for immediate action arises. If the public authorities were compelled to give notice and await the action of courts or other bodies, the delay might result in public calamity. The

right of self-preservation is one of the first laws of nature, and applies to organized societies as well as individuals."

Baumgartner v. Hasty, 100 Ind. 575, contains the following language:

"A man has no right to build a wooden house in a place prohibited by law, and thus endanger the safety of the person or property of others. He has neither a legal nor a moral right to do an illegal act on his own premises, which puts in jeopardy the person or property of another. There can be no acquisition of a right by the performance of an illegal act. In removing a building erected in violation of law, and in a situation where it imperils person or property, no private right is invaded, because none could grow out of the illegal act."

The following are like quotations from other cases:

"A building erected in violation of an ordinance fixing fire limits may be torn down or removed without any judicial proceeding whatever. Eichenlaub v. City of St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; Hine v. City of New Haven, 40 Conn. 478; King v. Davenport, 98 Ill. 305; Baumgartner v. Hasty, 100 Ind. 575; Klinger v. Brickel, 117 Pa. St. 328; 11 Atl. 556; McKibbin v. Ft. Smith, 35 Ark. 352. Delays of this character might endanger the public safety, and ought not to be tolerated."

Lemmon v. Guthrie Center, 84 N. W. 986.

"The real question is whether the City had the right to tear down the building without any judicial proceeding against the plaintiff, the owner thereof. We find no real conflict in the authorities upon this question; for it is held in many cases that where a municipal corpora-

tion has the power to prohibit the construction of wooden buildings in a district confined by ordinance, and has enacted an ordinance to that effect, it may remove any building erected in violation of the ordinance, and this, too, without any judicial proceeding whatever." (Citing cases from Ark., Pa., Ill., Ind., and Conn.)

Eickenlaub v. St. Joseph, 21 S. W. 8.

"The question has often arisen in other jurisdictions and, so far as our examination enlightens us, the authority to abate new buildings constructed in violation of existing ordinances, has been affirmed whenever the question has arisen. Not in all cases has the right to abate been rested on the ground that a building not constructed in compliance with the ordinance is a nuisance *per se*, but in some it has been deemed sufficient to say that the building so erected was erected in defiance of law; but, whatever the reasoning adopted, the right has been affirmed." (Citing cases.)

Micks v. Mason, 108 N. W. 707.

To the same effect see also:

Hine v. New Haven, 40 Conn. 478;

McKibbin v. Fort Smith, 35 Ark. 352;

King v. Davenport, 98 Ill. 305;

Klinger v. Bickel, 11 Atl. 555;

Baxter v. Seattle, 28 Pac. 537;

Wadleigh v. Gilman, 12 Me. 403;

Freund on Police Power, p. 560, sec. 528;

McQuillin on Municipal Corporations, Vol. III, p. 2077;

Dillon on Municipal Corporations, 5th Ed., Vol. II, pp. 1106-7;

9 Ann. Cas., p. 292, note;

4 R. C. L., p. 413, sec. 18.

These authorities uniformly announce the rule for which we contend, that a wooden building erected within fire limits may be summarily destroyed by public officers duly authorized thereto. This must be the law, or the only alternative would be that one, who by force or fraud had erected a wooden building within the fire limits, could maintain the building which he had illegally erected in defiance of law and at the imminent peril of neighboring property.

X.

THE CITY IS NOT AND CANNOT BE ESTOPPED TO DESTROY A WOODEN BUILDING WITHIN THE FIRE LIMITS.

A. The police power cannot be bartered away.

Plaintiffs in error claim that the city is estopped to destroy this building. The grounds on which they seek to base this estoppel are not in any case very convincing. However, it is well settled that the exercise of the police power cannot be bartered away, even by express contract; and the power to remove a wooden building erected within fire limits is an exercise of the police power of the first importance since it intimately concerns the safety of persons and property.

So in

Fire Dept. v. Atlas Co., 13 N. E. 329,

the Court of Appeals of New York held that (quoting from syllabus):

"The fire department of New York City, in the enforcement of the provisions of the building laws applicable to the city, is not estopped by the fact that the dock department of New York City made an illegal lease to defendant of the property sought to be subjected to the lawful regulations."

The court said at page 333:

"No department or officer of the city government could enter into a valid stipulation with the defendant by which it would be authorized to violate any law enacted for the public safety."

In

Brooklyn v. Furey, 30 N. Y. S. 349,

the court said:

"The sole question to be considered is whether or not the common council can permit the erection of frame buildings within the fire limits. It seems to me to be very clear that the common council has no such power, and the only reason that the courts have not so held is that the city authorities did not take action, but quietly allowed the law to be violated."

And on page 352:

"The counsel for respondent claims that his client, by reason of the consents obtained and the lapse of time, has vested rights. The difficulty is that he never had any rights to vest. A similar case arose in New York City, where the dock department attempted to lease piers with sheds erected in violation of the fire laws. Judge Earl in that case said (Fire Dept. of New York v. Atlas S. S. Co., 106 N. Y. 566, 577, 13 N. E. 329):

> "The defendant by its lease of the pier from the dock department, was not authorized to violate the building laws applicable to the city. No department or officer of the city government could enter into a valid stipulation with the defendant by which it would be authorized to violate any laws enacted for the public safety."

These cases are directly in point here. They are an application to the question of buildings erected in violation of building regulations of the general principle that the police power of a municipality cannot be bartered away.

This principle has frequently been enunciated by this court. We quote below from a few of the many cases in which this principle has been stated.

> "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and public morals. The Legislature cannot by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex:* And they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."
>
> Boston Beer Co. v. Mass., 7 Otto 25, 24 L. Ed. 989, 992.

"The governmental power of self protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

New York etc. R. Co. v. Bristol, 151 U. S. 556, 38 L. Ed. 269, 273.

"It has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away."

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. Ed. 630, 636.

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant."

Atlantic etc. R. Co. v. Goldsboro, 232 U. S. 548, 58 L. Ed. 721, 726.

"As the state may not, by any law or contract, surrender or restrict any portion of the sovereignty which it holds in sacred trust for the public weal, so a municipality, as a governmental agency, acting and bound always to act as trustee of the powers delegated to it, may not by contract, license or by law, surrender or restrict any portion of the police power conferred upon it."

28 Cyc., 696

McQuillin in his work on Municipal Corporations says, vol. 1, p. 842:

> "Contracts and ordinances relating to any municipal function which embarrass in any way the power of reguiation of public affairs are *ultra vires;* for the municipal corporation cannot in any manner divest itself of its power to control and regulate at all times everything within the domain of its jurisdiction. The adjudications present numerous instances of ordinances and contracts in derogation to the police powers which are uniformly declared void under this principle. Such powers belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema est lex:* and they are to be attained and provided for by such appropriate means as the discretion of those who officially represent and act for the municipal corporation may devise from time to time. 'The discretion can no more be bargained away than the power itself.' "

Following this rule it was held in

Douglas v. Greenville, 75 S. E. 687,

that the fact that plaintiff had been granted a permit by municipal authorities to erect a stable, and had incurred considerable expense, did not estop the city officials from enforcing an ordinance forbidding a stable in that location. At pages 689, 690 the court said:

> "The facts that petitioner had been granted a permit to build and had incurred considerable expense preparatory to building cannot avail against the ordinance. 'As the state may not, by any law or contract, surrender or restrict any portion of the sovereignty which it holds

> in sacred trust for the public weal, so a municipality, as a governmental agency, acting and bound always to act as trustee of the power delegated to it, may not by contract, license, or by-law, surrender or restrict any portion of the police power conferred upon it.' (Citing cases.)"

In

> Union Cemetery Assn. v. Kansas City, 161 S. W. 261,

the court held that the city was not estopped to enforce an ordinance prohibiting cemeteries within certain limits by the fact that a charter had been issued to the association to maintain a cemetery within those limits. The court said at page 272:

> "This is but the exercise of the police power which neither the city nor state can surrender or bargain away. All the authorities so hold. (Citing cases.)"

In

> State v. Great Northern R. Co., 158 N. W. 972, 974,

the court said:

> "The predecessor of the Great Northern entered into a contract with the city which provided that whenever the city directed that a street be carried over the tracks of the company by a bridge the company should build the abutments for the bridge and the superstructure over its tracks, and that the city should build the approaches thereto and should maintain the bridge and keep it in repair. This contract clearly attempted to take from the city a part of its police power and was unquestionably void. (Citing cases.)"

In

Otis Elevator Co. v. Chicago, 105 N. E. 338,

the court used the following language at page 343:

> "There is a suggestion of an equitable estoppel of the defendant to change the grade of the railroad. The doctrine of equitable estoppel will be applied to a city if justice and right require, as in a case where the assertion of a public right will encourage or permit fraud. * * * In the exercise of the police power the city had a right, within reasonable limits, to require the railroad company to elevate its tracks so as to avoid grade crossings upon streets and protect the lives and property of its citizens. (Citing cases.) That power, like other powers of government, when mere property interests are involved, is subject to constitutional limitations. (Citing cases.) But the power is incapable of alienation, and no valid contract can be made which assumes to alienate or surrender such a power which is required to continue in existence for the welfare of the public. (Citing cases.) *So far as requiring the elevation of the tracks was an exercise of the police power, no equitable estoppel could operate to prevent its exercise.*" (Italics ours.)

In

Shea v. Muncie, 46 N. E. 138,

the court held that the fact that a license to sell liquor had been granted to plaintiff and he had paid a license fee could not estop the city to enforce against him an ordinance forbidding the sale of liquor in the residence district. After discussing the general principles applicable, the court said at page 143:

> "Nor does the payment of the license fee to and retention thereof by the city create an estoppel against the city to enforce the ordinance against selling in the residence portion of the city, as is contended by appellant's counsel, both because of the principles of law above announced, and because the appellant must be held to know the law, and to have known when he sought the permit and when he paid his money that the city could lawfully withdraw the permit at any time, and that the city could not barter away its power to do so. Therefore there is no element of estoppel about it. The facts and circumstances as to the legal effect of the transaction were equally known to both parties. In such a case there can be no estoppel. (Citing cases.)"

In

State v. St. Paul etc. R. Co., 108 N. W. 261,

it is said at page 269:

> "The power of the state to require the defendants to construct the bridge in question, or any other bridge, at streets crossing the right of way, is an exercise of the police power, which can be neither contracted away nor lost by inaction on the part of the public authorities."

Under this well settled rule that public authorities can neither by contract nor estoppel be prevented from the free exercise of the police power it is clear that defendants in error are not and cannot be estopped from enforcing Ordinance No. 4170 (New Series) against this building.

B. The Charter itself provides that fire limits when once fixed can only be changed by extension. This absolutely takes it out of the power of any municipal officer to permit wooden buildings within fire limits once established.

It is said in Howell v. City of Hamburg, 165 Cal. 172, at page 175:

> "The charter of the city and county of San Francisco authorizes the board of supervisors to fix the limits within which wooden buildings or structures shall not be erected or maintained, and provides that 'such limits when once established shall not be changed except by extension'. (Charter, Chap. II, sec. 5.) So that it would seem that the supervisors would have had no authority after the fire, even by ordinance, to permit the erection of any wooden building within the limits, *the charter provision limiting their power in this behalf.*" (Italics ours.)

In Brooklyn v. Furey, cited *supra*, the court, in considering a similar situation, said:

> "When the legislature gave the common council power to enlarge the fire district, I am of opinion that it thereby prohibited that body from doing the opposite. The legislature considered what powers should be given on the subject to the common council, and determined that it might enlarge, but not reduce, the fire district."

The Legislature, by our Charter, has expressly and absolutely prohibited the erection of further wooden buildings within fire limits. It has gone further. It has provided that once fixed, the fire limits can never be reduced. And yet plaintiffs in

error claim that by indirection and inaction the city's officers could do what they are expressly forbidden to do—permit the erection of wooden buildings within the fire limits. If this contention is correct then the prohibition of the Charter can be nullified, simply by the supervisors and other city officers allowing wooden buildings to be built within fire limits. In other words by permitting the law to be broken, which it is their express duty to enforce, they and their successors will be estopped thereafter to enforce the law against those who have broken it. And this in the very face of the fact that the Charter framers have shown very emphatically how important they considered the enforcement of the fire limits, by making it impossible for the supervisors ever to reduce them, no matter how imperatively necessary such a reduction might seem to be.

We submit that on the face of it this proposition cannot be true.

XI.

PLAINTIFFS IN ERROR ARE NOT ENTITLED TO ANY RELIEF IN EQUITY BECAUSE THEY DO NOT COME INTO COURT WITH CLEAN HANDS.

Plaintiffs in error are not in any position to attack Ordinance No. 4170 (New Series) for the reason that having erected a wooden building in violation of law and continued in violation of law to maintain it to the present time they cannot seek the aid of a court of equity to maintain it.

"No one can take advantage of his own wrong."

California Civil Code, section 3517.

"In accordance with a favorite maxim of equity jurisprudence, that he who applies for equity must also have done it, a party applying for an injunction must come into equity with clean hands and a clear conscience."

Joyce on Inj., vol. 1, p. 30, sec. 14;

14 R. C. L., sec. 56, p. 353;

Pomeroy, Eq. Jurisp., 3d Ed., vol. 1, sec. 397, p. 657;

Spelling, Inj. & Ex. Rem., 2d Ed., vol. 1, sec. 28, p. 40;

10 Enc. Pl. & Pr., p. 932;

Pittsburg etc. Co. v. Crothersville, 64 N. E. 914;

Rudolph v. Golden & Co., 39 App. Cas. (D. C.) 230;

Daneiger v. Stone, 187 Fed. 853;

Board v. O'Dell etc. Co., 115 Fed. 574;

Fairfield etc. Co. v. Bradbury, 89 Fed. 393;

Sweeney v. Wilkes-Barre, 62 Pa. Supr. Ct. 54.

This is the rule in California.

"If billboards * * * constitute a public nuisance a court of equity will refuse any relief designated to perpetuate their maintenance, regardless of the validity of the ordinance."

Varney & Green v. Williams, 155 Cal. 318.

"A person who comes into a court of equity for an injunction in a case of this kind must

come with clean hands; he cannot be granted relief upon a claim to the exclusive use of a trade-mark which contains a false representation calculated to deceive the public as to the manufacture of the article and the place where it is manufactured."

Joseph v. Macowsky, 96 Cal. 518;

Millbrae Co. v. Taylor, 37 P. 236;

Castroville etc. Co. v. Col., 6 Cal. App. 533;

Pac. Debenture Co. v. Caldwell, 147 Cal. 106.

The plaintiffs in error having erected and maintained a building in violation of law do not come into court with clean hands. Regardless of the validity of Ordinance No. 4170 (N. S.) equity will not aid them to maintain a building in violation of the law.

For the foregoing reasons we respectfully submit that the judgment in this case is correct and should be affirmed.

Dated, San Francisco,
January 10, 1921.

Respectfully submitted,

GEORGE LULL,
City Attorney, City and County of San Francisco,
MAURICE T. DOOLING, JR.,
Assistant City Attorney, City and County of San Francisco,
Attorneys for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

No. 202.—October Term, 1920.

Michael Maguire and C. S. Maguire, Plaintiffs in Error, *vs.* Timothy A. Reardon et al., as Commissioners, Constituting the Board of Public Works of the City and County of San Francisco et al.	In Error to the District Court of Appeal of the State of California in and for the First Appellate District, Division One.

[February 28, 1921.]

Mr. Justice McReynolds delivered the opinion of the Court.

Defendants in error, officers and agents of the City of San Francisco, purporting to act under an ordinance approved May 8, 1917, gave notice of their intention to demolish and remove a wooden building on Van Ness Avenue, the property of plaintiffs in error. Thereupon the latter instituted this proceeding for an injunction upon the ground, among others, that as the building was lawfully erected the ordinance violated the Federal Constitution.

The court below following *Bancroft* v. *Goldberg, Bowen & Co.*, 166 Cal. 416, held that the building was erected in 1906 within the fire limits theretofore prescribed in violation of valid local regulations duly enacted under the charter, and consequently there could be no reasonable doubt of the municipality's power to direct its removal.

The meaning and effect of the charter and ordinances thereunder are questions of local law determination of which by the state courts we commonly accept as conclusive. It is admitted that the building was constructed within defined fire limits, and the Supreme Court of the State has said this was contrary to valid regulations then in force. The challenged ordinance must therefore be treated as

affecting an unlawful structure, and as so applied we can find no plausible ground for holding it in conflict with the Federal Constitution.

The judgment below is

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.